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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 64.

HELEN C. RAUB, CHARLES D. COLLINS, LEWIS E. COLLINS, ET AL., PLAINTIFFS IN ERROR,

vs.

HELEN C. CARPENTER, HELEN K. BREMMERMAN, EDMUND H. BROWN, ET AL.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MARCH 21, 1901.

(18,086.)

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In the Court of Appeals of the District of Columbia

1 HELEN C. RAUB ET AL., Appellants,
vs.
HELEN C. CARPENTER ET AL. } No. 1030.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

To the honorable justice holding said court:

Your petitioners, Helen C. Raub, Charles D. Collins, Lewis E. Collins, Martha E. Collins, Margaret Worster, Charles S. Douglas, Harry Hauptman, Louisa Donaldson, Harriet Ege, Annie Beek, Georgiana Hutchins, William T. Hauptman, respectfully represent as follows:

1. That they have notice that a certain paper-writing bearing date the 15th day of April, 1898, purporting to be the last will and testament of Charles Wesley Hauptman, deceased, in and by which William E. Edmonston is appointed executor thereof, having been filed in this court, and citation upon the next of kin to show cause, if any there be, why the said paper-writing purporting to be the last will and testament of the decedent should not be admitted to probate; that the undersigned, Charles D. Collins, being the son of Annie Hauptman, a deceased sister of the said Charles Wesley Hauptman, deceased, and the said Helen C. Raub, being the daughter of Philip H. Hauptman, a deceased brother of the said Charles Wesley Hauptman, deceased, and are among the next of kin, pursuant to the statute in such case made and provided, do hereby contest the said probate and validity of the said paper-writing as purporting to be such last will and testament, and for that purpose allege against the validity of such alleged will, and that the same is not entitled to be admitted to probate and record, for the following reasons, to wit:

2. That the said paper-writing is not the last will and testament of the said deceased.

3. That the said deceased was not at the time of making and subscribing and acknowledging by him of said paper-writing of sound mind and memory or in any respect capable of making a valid will or contract.

4. That the said paper-writing purporting to be such last will and testament was obtained and the execution thereof procured by fraud and circumvention and undue influence practiced against and upon the said Charles Wesley Hauptman, deceased, by Helen Car-
2 penter, Mary M. King, William C. Hauptman, Caroline Watson, Lloyd Douglas, and other persons now unknown to your petitioners.

5. That the said paper-writing was not freely and voluntarily executed or made as his last will and testament by said decedent, but that the subscription thereto was procured by fraud, coercion, and undue influence exercised upon him by the said Helen Carpenter, Mary M. King, William C. Hauptman, Caroline Watson, and Lloyd L. Douglas, and other persons now unknown to your petitioners.

6. Your petitioners therefore aver, as they represent a large number of the next of kin and heirs-at-law of the deceased, that their interest will be injuriously affected by allowing the said pretended last will and testament to be probated.

Wherefore your petitioners pray that said paper-writing may be stricken from the files of this court, and that the probate thereof be refused; that issues may be framed between these caveators and the proponents of the will to be tried by a jury in order to determine the allegations of facts bearing upon the validity of said paper-writing purporting to be the last will and testament of the said Charles Wesley Hauptman, and for such further relief as the nature of the case may require.

HELEN C. RAUB.
C. D. COLLINS.

CLAYTON E. EMIG,
Attorney for Caveators.

DISTRICT OF COLUMBIA, *ss:*

We, the undersigned petitioners, being first duly sworn, do depose and say that we and each of us have read the foregoing petition and know the contents thereof; that the facts therein contained and stated from our personal knowledge are true, and those stated upon information and belief we believe to be true.

HELEN C. RAUB.
C. D. COLLINS.

Subscribed and sworn to before me this 22d day of Dec., 1899.

S. A. TERRY,
[SEAL.] *Notary Public.*

Endorsement: "Petition of Helen C. Raub *et al.* Filed Dec. 26, 1899."

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In re Estate of CHARLES W. HAUPTMAN, Deceased. No. 8916.

Answer to Caveat.

William E. Edmonston, the executor named in the will of the above-named decedent, for answer to the caveat filed in the above-entitled cause, says as follows:

1. He is advised that the allegations set forth in the first
3 paragraph of the caveat, concerning the relationship of the caveators to the decedent, Charles W. Hauptman, are true as alleged.

2. Further answering the said caveat, he denies the allegations of the 2nd, 3rd, 4th, 5th, and 6th paragraphs thereof, and each and every of them, and avers the facts to be that the said paper-writings dated the 30th day of November, 1896, and the 15th day of April, 1898, and purporting, respectively, to be the last will and testament and a codicil thereto of the said Charles W. Hauptman, are the last will and testament and a codicil thereto of the said decedent; that at the time of the execution of the said paper-writings the said Charles W. Hauptman was of sound and disposing mind and capable of executing a valid deed or contract; that the said paper-writings were not executed through or procured by the fraud, circumvention, and undue influence practiced against and upon the said Charles W. Hauptman, deceased, by Helen Carpenter, Mary M. King, William C. Hauptman, Caroline Watson, Lloyd Douglas, or any other person or persons, but were the free and voluntary acts of the said testator; that said paper-writings were not executed by said decedent through the fraud and coercion exercised upon him by the said Helen Carpenter, Mary M. King, William C. Hauptman, Caroline Watson, and Lloyd Douglas, or any other person or persons.

This respondent is willing that issues may be framed and tried before a jury according to law so to determine the truth of the allegations of the said caveat.

WILLIAM E. EDMONSTON.

J. J. DARLINGTON,
Solicitor for Respondent.

DISTRICT OF COLUMBIA, *ss:*

I, William E. Edmonston, on oath say that I have read the foregoing answer by me subscribed and know the contents thereof; that the matters and things therein set forth as of my own personal knowledge are true, and that those set forth on information and belief I believe to be true.

[SEAL.] WILLIAM E. EDMONSTON.

Subscribed and sworn to before me this 22 day of January, A. D. 1900.

J. D. COUGHLAN,
Notary Public.

Endorsement: "Answer of William E. Edmonston. Filed Jan. 27, 1900."

4 In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In re Estate of CHARLES W. HAUPTMAN, Deceased. No. 8916.

Answer to Caveat.

We, Helen C. Carpenter, Mary M. King, William C. Hauptman, Caroline Watson, Lloyd Douglas, Helen K. Bremerman, Edmund H.

Brown, William F. Brown, Mary E. Perry, Mary B. Tracy, John D. Hauptman, Clinton C. Hauptman, and Clara B. Hurley, beneficiaries named in the will of the above-named decedent, for answer to the caveat filed in the above-entitled cause, say as follows:

1. They admit the allegations set forth in the first paragraph of the caveat concerning the relationship of the caveators to the decedent, Charles W. Hauptman, to be true.

2. Further answering the said caveat, they deny the allegations of the 2nd, 3rd, 4th, 5th, and 6th paragraphs thereof and each and every of them, and aver the facts to be that the said paper-writings dated the 30th day of November, 1896, and the 15th day of April, 1898, and purporting, respectively, to be the last will and testament and a codicil thereto of the said Charles W. Hauptman, are the last will and testament and a codicil thereto of the said decedent; that at the time of the execution of the said paper-writings the said Charles W. Hauptman was of sound and disposing mind and capable of executing a valid deed or contract; that the said paper-writings were not executed through or procured by the fraud, circumvention, and undue influence practiced against and upon the said Charles W. Hauptman, deceased, by Helen Carpenter, Mary M. King, William C. Hauptman, Caroline Watson, Lloyd Douglas, or any other person or persons, but were the free and voluntary acts of the said testator; that said paper-writings were not executed by said decedent through the fraud and coercion exercised upon him by the said Helen Carpenter, Mary M. King, William C. Hauptman, Caroline Watson, and Lloyd Douglas, or any other person or persons.

They are willing that issues may be framed and tried before a jury, according to law, so to determine the truth of the allegations of the said caveat.

WM. F. BROWN.
HELEN C. CARPENTER.
MARY M. KING.
WM. C. HAUPTMAN.
CAROLINE WATSON.
LLOYD DOUGLASS.
JOHN D. HAUPTMAN.
CLINTON C. HAUPTMAN.
MARY E. PERRY.

We, Helen C. Carpenter, Mary M. King, William C. Hauptman, Caroline Watson, Lloyd Douglas, Helen K. Bremerman, Edmund H. Brown, William F. Brown, Mary E. Perry, Mary B. Tracy, John D. Hauptman, Clinton C. Hauptman, and Clara B. Hurley, on oath say that we have read the foregoing answer by us subscribed and know the contents thereof; that the matters and things therein set forth as of our own personal knowl-

edge are true, and that those set forth on information and belief we believe to be true.

WM. H. BROWN.
HELEN C. CARPENTER.
MARY M. KING.
WM. C. HAUPTMAN.
CAROLINE WATSON.
LLOYD DOUGLASS.
JOHN D. HAUPTMAN.
CLINTON C. HAUPTMAN.
MARY E. PERRY.

Subscribed and sworn to before me the 1st day of February, A. D. 1900, by the above-named Helen C. Carpenter, Mary M. King, Wm. C. Hauptman, Caroline Watson, Lloyd Douglass, John D. Hauptman, and Clinton C. Hauptman, and subscribed & sworn to before me this 2d day of February, A. D. 1900, by above-named Mary E. Perry and also—

Subscribed and sworn to before me the 2d day of February, A. D. 1900, by the above-named Wm. F. Brown.

J. D. COUGHLAN,
[SEAL.] *Notary Public.*

Endorsement: "Answer to caveat filed February 7, 1900."

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In re Estate of CHARLES W. HAUPTMAN, Deceased. No. 8916.

Issues.

Upon consideration of the caveat filed herein to the paper-writing dated the 30th day of November, 1896, and offered for probate as the last will and testament of said Charles W. Hauptman, deceased, and of the answer to said caveat, it is on this 19th day of March, 1900, ordered that the following issues be and they hereby are, set for trial by a jury in this court:

1. Was said paper-writing executed by said Charles W. Hauptman through the fraud, circumvention, or undue influence practiced against and upon him by Helen Carpenter, Mary M. King, William C. Hauptman, Caroline Watson, and Lloyd Douglas or any other person or persons?

2. Was said paper-writing executed by said Charles W. Hauptman through fraud or coercion exercised upon him by Helen Carpenter, Mary M. King, William C. Hauptman, Caroline Watson, and Lloyd Douglas, or any other person or persons?

6 3. Was said Charles W. Hauptman, at the time of the execution of said paper-writing, of sound and disposing mind and capable of executing a valid deed or contract?

4. Was the said paper-writing the last will and testament of the said decedent?

And upon consideration of the caveat filed herein to the paper-writing dated the 15th day of April, 1898, and offered for probate as a codicil to said paper-writing dated the 30th day of November, 1896, and of the answer to said caveat, it is further ordered that the following issues be set for trial by a jury in this court:

1. Was said paper-writing executed by said Charles W. Hauptman through the fraud, circumvention, or undue influence practiced against and upon him by Helen Carpenter, Mary M. King, William C. Hauptman, Caroline Watson, and Lloyd Douglas or any other person or persons?

2. Was said paper-writing executed by said Charles W. Hauptman through fraud or coercion exercised upon him by Helen Carpenter, Mary M. King, William C. Hauptman, Caroline Watson, and Lloyd Douglas or any other person or persons?

3. Was said Charles W. Hauptman at the time of the execution of said paper-writing of sound and disposing mind and capable of executing a valid deed or contract?

4. Was the said paper-writing the codicil to the last will and testament of the said decedent?

CHAS. C. COLE, *J.*

GEO. F. BATEMAN.	GEORGE G. LEWIS.
JOHN PEPPER.	JOHN C. BRUCE.
JOHN B. HARRY.	CHAS. G. McCHESNEY.
ARTHUR B. NICHOLS.	GEORGE R. CHAMBERLIN.
CLARENCE W. OLIVER.	RICHARD L. ELLIOTT.
FRANK D. HOSPITAL.	L. M. CORNWALL.

Endorsement: "Issues filed March 19, 1900."

Court resumes its session pursuant to adjournment, Asso. Justice Cole presiding.

In the Matter of the Estate of CHARLES W. HAUPTMAN, Deceased.
No. 8916, Doc. 25.

Joseph J. Darlington & Joseph Burkart, attorneys for caveatees.
Clayton E. Emig & Charles Poe, attorneys for caveators.

This day come here the caveatees, Helen C. Carpenter, Helen K. Breme-man, Edmund H. Brown, Mary E. Perry, William F. Brown, Lloyd Douglas, Caroline Watson, John D. Hauptman, Clinton C. Hauptman, Mary B. Tracy, Clara B. Hurley, William C. Hauptman, Mary M. King, David Lomax, William E. Edmonston, Mary S. Heinecke, Washington City Orphan Asylum, by J. J. Darlington, president; Washington City Bible Society, by A. W. Petzer,
7 president; Methodist Home D. C., by A. B. Duvall, president; The American University, John F. Hurst, chancellor; O. B. Brown, chairman b'd of directors Central Union Mission; Lucy Webb Hayes Nat'l Training School and Sibley Hospital, Alfred C. Ames, pres'd't; American Bible Society, by Wm. Ferelke; Missionary Society of the Methodist Episcopal Church, by Homer Eaton,

treasurer; W. A. Spencer, cor. sec'Try Board Church Extension Methodist Episcopal Church; Board of Trustees of Foundry M. E. Church, by Addison M. Smyth, president, by their attorneys, and the caveators, Charles D. Collins, Lewis E. Collins, Martha E. Collins, Margaret A. Worster, William F. Hauptman, Georgiana Hutchins, Charles S. Douglass, Harry Hauptman, Maria Louisa Donaldson, Harriet E. Ege, Annie Beek, & Helen C. Raub, by their attorneys. Upon motion of the attorneys for the caveatees, it is this 13th day of June ordered that the caveatees be made plaintiffs and the caveators be made defendants upon the trial of the issues heretofore ordered to be tried to determine the validity of the paper-writing propounded as the last will and testament of Charles W. Hauptman, deceased, and it is further ordered that the said issues be tried by the jury summoned for and now in attendance upon the criminal term No. 2 of this court, a jury of good and lawful men of the District of Columbia, to wit:

Petit Jury.

Richard L. Elliot.	John Pepper.	John B. Harry.
Charles G. McChesney.	George R. Chamberlin.	George G. Lewis.
Luther M. Cornwall.	Clarence W. Oliver.	Frank D. Hospital.
John C. Bruce.	George F. Bateman.	Arthur B. Nichols.

Adjourned until tomorrow, June 15th, 1900, at 10 o'clock.

CHAS. C. COLE.

Copied from Proceedings No. 30, p. 182.

Court resumes its session pursuant to adjournment, Mr. Justice Cole presiding.

HELEN C. CARPENTER ET AL. vs. CHARLES D. COLLINS ET AL. } Issues in Hauptman Will.

Joseph J. Darlington & Joseph Burkart, attorneys for caveatees.
Clayton E. Emig & Charles Poe, attorneys for caveators.

Now again come here the parties aforesaid, in the manner aforesaid, and the same jury that was respited yesterday, and, after hearing the argument of counsel and the instructions of the court, in answer to the said issues, upon their oaths, the said jurors, in a signed verdict, do say:

In answer to the first issue:

1. Was said paper-writing executed by said Charles W. Hauptman through the fraud, circumvention, or undue influence practiced against and upon him by Helen Carpenter, Mary M. King, William C. Hauptman, Caroline Watson, and Lloyd Douglas, or any other person or persons? They answer, No.

In answer to the second issue:

2. Was said paper-writing executed by said Charles W. Hauptman through fraud or coercion exercised upon him by Helen Car-

penter, Mary M. King, William C. Hauptman, Caroline Watson, and Lloyd Douglas, or any other person or persons? They answer, No.

In answer to third issue:

3. Was said Charles W. Hauptman at the time of the execution of said paper-writing of sound and disposing mind and capable of executing a valid deed or contract? They answer, Yes.

In answer to the fourth issue:

4. Was the said paper-writing the last will and testament of the said decedent? They answer, Yes.

And upon consideration of the caveat filed herein to the paper-writing dated the 15th day of April, 1898, and offered for probate as a codicil to said paper-writing dated the 30th day of November, 1896, and of the answer to said caveat, it is further ordered that the following issues be set for trial by a jury in this court:

In answer to the first issue:

1. Was said paper-writing executed by said Charles W. Hauptman through the fraud, circumvention, or undue influence practiced against and upon him by Helen Carpenter, Mary M. King, William C. Hauptman, Caroline Watson, and Lloyd Douglas or any person or persons? They answer, No.

In answer to the second issue:

2. Was said paper-writing executed by said Charles W. Hauptman through fraud or coercion exercised upon him by Helen Carpenter, Mary M. King, William C. Hauptman, Caroline Watson, and Lloyd Douglas or any other person or persons? They answer, No.

In answer to third issue:

3. Was said Charles W. Hauptman at the time of the execution of said paper-writing of sound and disposing mind and capable of executing a valid deed or contract? They answer, Yes.

In answer to the fourth issue:

4. Was the said paper-writing the codicil to the last will and testament of the said decedent? They answer, Yes.

CHAS. C. COLE.

GEORGE F. BATEMAN.	GEORGE G. LEWIS.
JOHN PEPPER.	JOHN C. BRUCE.
JOHN B. HARRY.	CHARLES G. McCHESNEY.
ARTHUR B. NICHOLS.	GEORGE R. CHAMBERLIN.
CLARENCE W. OLIVER.	RICHARD L. ELLIOTT.
FRANK D. HOSPITAL.	L. M. CORNWALL.

And court adjourned.

CHAS. C. COLE.

Copied from Proceedings No. 30, p. 196.

9 In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In re Estate of CHARLES W. HAUPTMAN. No. 8916.

Order.

The issues set for trial by jury in this court under an order passed herein on the 19th day of March, 1900, under the caveat to the will and codicil of Charles W. Hauptman, filed by Helen C. Raub, Charles D. Collins, Louis E. Collins, Martha E. Collins, Margaret Worster, Charles S. Douglass, Harry Hauptman, Marie Louisa Donaldson, Harriet Ege, Annie Beck, Georgiana Hutchins, and William T. Hauptman, having been found in favor of the said will and codicil, it is by the court, this 26th day of June, A. D. 1900, adjudged, ordered, and decreed that the paper-writings bearing date, respectively, the 30th day of November, 1896, and the 15th day of April, 1898, and purporting, respectively, to be the last will and testament and a codicil thereto of the said Charles W. Hauptman, duly executed to pass both the real estate and the personal property of the said testator within said District, be, and the same hereby are, admitted to probate and record, and that letters testamentary upon the estate of the said decedent be issued to William E. Edmonston, the executor therein named, upon his giving bond in the penalty of sixty thousand dollars, conditioned for the faithful performance of his trust; and it is further adjudged, ordered, and decreed that the said William E. Edmonston, the executor, as aforesaid, recover against the said caveators the costs incurred under their said caveat, and that they have execution therefor as at law.

From this decree the caveators, by their counsel, pray an appeal, which is granted, and the penalty of a supersedeas bond, if one be given, is fixed at five thousand dollars, and bond for costs in penalty of one hundred dollars.

CHAS. C. COLE, *J.*

Endorsement: "Order admitting will to probate and granting letters testamentary to Wm. E. Edmonston." Filed June 26, 1900.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the — Estate of CHARLES W. HAUPTMAN, Deceased. No. 8916.

The caveators in this case, by Charles Poe and Clayton E. Emig, their attorneys, move the court to vacate, annul, and set aside its order passed in this cause on or about the 26th day of June, A. D. 1900, whereby it ratified, approved, and confirmed the verdict of the jury empaneled to try the issues in this cause as to whether certain paper-writings in said issues more fully set forth were or were not the last will and testament and codicil thereto of the said Charles W. Hauptman, deceased, and granting letters testamentary upon said

alleged last will and testament and codicil of said Charles W.
10 Hauptman, deceased, to William E. Edmonston, and that the said letters testamentary and the order granting the same may be revoked, annulled, and set aside, and assign the following reasons for their said motion and accompany the same with certain affidavits filed herewith:

The grounds upon which said motion is founded are as follows, to wit:

That at the time of the selection of the jurors for service for the June term of this honorable court or of criminal court number 2 of the supreme court of the District of Columbia, before whom the issues out of this honorable court were to be tried by an order passed in this court, one of said jurors, to wit, one George G. Lewis, was examined by the Honorable Edward F. Bingham, chief justice, in open court, as to his qualifications and competency to serve as a juror in issues of fact under the statutes and laws of the United States, as applicable to the District of Columbia and to the supreme court thereof, and that upon such an examination as to his qualification and competency, in answer to the question as to whether he was over 21 years of age and under 65 years, the said George G. Lewis, in the presence of Charles Poe, one of the attorneys for the caveators in this case, answered that he was, and in answer to the question as to whether he had ever been convicted of a crime involving moral turpitude, so propounded to him by the said Chief Justice Edward F. Bingham, answered that he never had been.

[SEAL.] And your petitioners further show as a ground upon which this motion is founded that in truth and in fact when said George G. Lewis so made the two affidavits as to his qualification and competency as a juror he was not of the age of 21 years, and has not yet attained that age, and that the said George G. Lewis was but little over the age of 20 years, and had been convicted of the crime of petty larceny in the police court of the District of Columbia several times prior to the making of said affidavits as to his qualifications and competency, all of which facts both as to his age and as to his convictions of crime involving moral turpitude were unknown to your petitioners and their attorneys until within a few days prior to the filing of this motion.

That at the beginning of the trial of the issues herein a full panel of twenty jurors was furnished by the clerk to both caveators and caveatees, upon which appeared the name of George G. Lewis as a competent and qualified juror, from which list of 20 jurors the caveators struck four names other than that of the said George G. Lewis, neither the said caveators nor their attorneys of record at that time having any knowledge nor suspicion that the said George G. Lewis was not a competent or qualified juror, he having made oath in the presence and hearing of one of the attorneys of record that he was so competent and qualified within a few days prior to the beginning of said trial and in open court. The allegation in this petition as to the age of the said George G. Lewis is made upon information and belief and after a careful investigation as to the

truth of said allegation by the party making said allegation,
11 and the allegation as to the several convictions of said George G. Lewis of the crime of larceny is made after investigation of the records of the police court of the District of Columbia by this affiant, and the affiant making this affidavit believes that the information upon which this affidavit is based is true.

Therefore your petitioners move that the orders aforesaid passed in this cause may be vacated and set aside.

C. D. COLLINS,
One of the Caveators & Pet'n'rs.

CHAS. POE,
C. E. EMIG,
Attorneys for Caveators.

DISTRICT OF COLUMBIA, *ss:*

I solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof, and that the facts therein stated upon my own knowledge are true and those stated upon information and belief I believe to be true.

C. D. COLLINS.

Subscribed and sworn to before me this 13th day of July, 1900.

THOS. H. CALLAN,
[SEAL.] *Notary Public.*

(Endorsement:) "Motion to vacate order admitting will to probate and to revoke letters testamentary. Filed July 16, 1900."

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Estate of CHARLES W. HAUPTMAN, Deceased. No. 8916.

Affidavit of Frank M. Helan, to accompany motion to vacate the orders in the above-entitled cause admitting the will and codicil of Charles W. Hauptman and granting letters testamentary thereupon.

DISTRICT OF COLUMBIA:

I, Frank M. Helan, a witness of lawful age, being on oath duly sworn, depose and say: I am 43 years of age, a citizen of the United States, and a resident of the District of Columbia, and am at present one of the detectives of the Metropolitan police force of the District of Columbia, and have been connected with the police force of said District for over 11 years; that in or about the month of March, 1895, I arrested one George G. Lewis on three charges of larceny committed within the District of Columbia, and afterwards, to wit, the 20th of March, 1895, appeared in the police court of the said District as a witness against the said Lewis at his trials upon said charges, and at said trials the said Lewis having first entered a plea of not guilty withdrew his said plea and entered a plea of guilty,

and he was then and there adjudged to be guilty of the crime
12 of larceny, as alleged in the indictments or informations against him; that I had while in charge of said case a search warrant for the goods and the personal property alleged to have been stolen by said Lewis, under which I seized and secured the articles shown in the return thereto; that I have within the last few days seen the person whom I arrested on said charges of larceny and who was convicted thereof, and I identify him as the same person whom I am informed and verily believe to be the same person who served, under the name of George G. Lewis, as a juror to try the issues as to the validity of the will and codicil of Charles W. Hauptman, as mentioned in the title to this affidavit, and I annex a certified copy of the records of the trials and convictions of said George G. Lewis, under the name of George Lewis, hereto and make the same a part of this my affidavit.

FRANK M. HELAN.

Subscribed and sworn to before me this 14th day of July, 1900.

THOS. H. CALLAN,
Notary Public.

[SEAL.]

In the Police Court of the District of Columbia, March Term, 1895.

UNITED STATES
vs.
GEORGE LEWIS. } No. 81015. Information for Larceny.

Defendant arraigned March 18th, 1895.
Plea, not guilty. Continued March 20, '95.
March 20, '95.—Judgment, guilty.
Sentence: To pay a fine of $20.00, and in default to be imprisoned 20 days in jail.
$20.00 paid.

JULY 13TH, 1900.

I hereby certify, under the seal of this court, that the foregoing is a true copy of the record of the proceedings had in the police court in the above-entitled case.

F. A. SEBRING,
Dep. Clerk Police Court, Dist. of Columbia.

[SEAL.]

(Endorsed:) Witnesses, William Craig, Frank Helan, M. P.

In the Police Court of the District of Columbia, March Term, 1895.

UNITED STATES
vs.
GEORGE LEWIS. } No. 81016. Information for Larceny.

Defendant arraigned March 18th, 1895.
Plea, not guilty. Continued March 20th, 1895.
3, 20, '95.—Judgment, guilty.

Sentence: To pay a fine of $20.00, and in default to be im-
13 prisoned 20 days in jail; to take effect upon expiration of imprisonment in jail under sentence imposed in U. S. case No. 81015, of even date.
$20.00 paid.

JULY 13TH, 1900.

I hereby certify, under the seal of this court, that the foregoing is a true copy of the record of the proceedings had in the police court in the above-entitled case.

[SEAL.] F. A. SEBRING,
Dep. Clerk Police Court, Dist. of Columbia.

(Endorsed:) Witness, William Craig.

In the Police Court of the District of Columbia, March Term, 1895.

UNITED STATES *vs.* GEORGE LEWIS. } No. 81017. Information for Larceny.

Defendant arraigned March 18th, 1895.
Plea, not guilty. Continued March 20th, 1895.
3, 20, '95.—Judgment, guilty.
Sentence: To pay a fine of $20.00, and in default to be imprisoned 20 days in jail; to take effect upon expiration of imprisonment in jail under sentence imposed in U. S. case No. 81016, of even date.
$20.00 paid.

JULY 13TH, 1900.

I hereby certify, under the seal of this court, that the foregoing is a true copy of the record of the proceedings had in the police court in the above-entitled case.

[SEAL.] F. A. SEBRING,
Dep. Clerk Police Court, Dist. of Columbia.

(Endorsement:) Affidavit of Frank M. Helan and certified copies accompanying same. Filed July 16, 1900.
(Endorsed:) Witness, William Craig.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Estate of CHARLES W. HAUPTMAN, Deceased. No. 8916.

Affidavit of Charles Poe, to Accompany Motion to Set Aside the Orders Passed in this Cause.

Charles Poe, a witness of lawful age, being duly sworn, makes oath, deposes, and says as follows: That he is a member of the bar of the supreme court of the District of Columbia and one of the attorneys of record in this cause; that on the fifth day of June, 1900, the day of empaneling the jurors to serve for the June term, 1900, of this

honorable court, he was present in court when the jurors,
14 drawn and examined under oath for the purpose of determining their competency and qualifications to serve as jurors, were questioned by the Honorable Edwin F. Bingham, chief justice of the supreme court of the District of Columbia, and that upon said examination on oath he heard George G. Lewis, one of the jurors so then and there accepted as a competent and qualified juror, in answer to the question propounded to him as to whether he was a citizen of the United States, a resident of the District of Columbia, over the age of twenty-one years and under the age of 65 years, answer that he was; and also heard the said George G. Lewis, in answer to the question so propounded to him as to whether he had ever been convicted of a crime or misdemeanor involving moral turpitude, answer that he never had been.

Affiant further makes oath that at the time he heard the said George G. Lewis so make the statements under oath and qualify as a juror he (affiant) did not know or suspect that said statements were not true; that he did not know or suspect the same when said jury was sworn to try the issues in the above-entitled cause, and did not know or have any intimation of said facts until several days after the entry of the decretal order which is now sought to be vacated, and that immediately upon receiving the intimation that said Lewis was not over the age of 21 years and had been convicted of a crime or misdemeanor involving moral turpitude, he proceeded to have the facts in relation thereto investigated, and had the said Lewis pointed out to Detective Frank M. Helan as the person who had served on said jury, and the said Helan, without hesitation, identified the said Lewis as the same person whom he had arrested and seen convicted, as set forth in the affidavit of the said Helan, filed at the same time that this affidavit is filed.

CHAS. POE.

Subscribed and sworn to before me this 14th day of July, A. D. 1900.

THOS. H. CALLAN,
Notary Public.

[NOTARY SEAL.]

Copy.

Endorsement: "Affidavit of Charles Poe." Filed July 16, 1900.

July 17, 1900.—Appeal bond filed and approved.

In the Supreme Court of the District of Columbia.

In re Estate of CHARLES W. HAUPTMAN. No. 8916, Adm. Doc.

This cause coming on to be heard upon the caveators' motion to vacate the decree of June 26th, 1900, admitting to probate and record the papers offered as the last will and testament and a codicil thereto of the above-named decedent, and the same having been argued by the counsel for the parties respectively, and duly considered, and

the court further being of the opinion that at the trial there
15 was no evidence of mental incompetency, fraud, or undue influence, it is thereupon by the court, this twentieth day of September, A. D. 1900, ordered that the said motion be, and the same hereby is, denied.

CHAS. C. COLE, *J.*

Endorsement: "Order denying motion to vacate decree of June 26, 1900." Filed September 20, 1900.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re CHARLES W. HAUPTMAN, Deceased. No. 8916.

The caveators (defendants) herein pray an appeal to the Court of Appeals of the District of Columbia from the order, this 20th day of September, A. D. 1900, passed overruling their motion to vacate and set aside the decretal order passed in this cause on the 26th day of June, 1900.

CHAS. POE,
CLAYTON E. EMIG,
Attorneys for Caveators.

Appeal allowed Sept. 20, 1900.

CHAS. C. COLE, *J.*

Endorsement: "Prayer for appeal and order granting same." Filed September 20, 1900.

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In the Estate of CHARLES W. HAUPTMAN, Deceased. No. 8916.

Bill of Exceptions.

At the trial of this cause before the Honorable Charles C. Cole and a jury duly sworn and empaneled, the caveators, to maintain the issue on their part joined, offered as a witness, duly sworn, one MARY S. HEINEKE, who testified that she was a niece of the testator and one of the caveatees in this cause; that subsequent to the execution of the last will and testament of said testator and the codicil thereto she had a conversation with the caveatee, Helen C. Carpenter, in which conversation the said Helen C. Carpenter related to her, the said witness, statements made by testator as to what disposition he had made of his estate; but to this offer the caveatees objected, and the court sustained their objection and excluded said declaration of said Helen C. Carpenter so proposed to be proved; to which ruling of the court sustaining said objection and excluding said testimony the caveators, by their counsel, then and there excepted and prayed the court to note their said exception upon his notes, which was accordingly done befor the jury retired, and the caveators then

and there prayed the court to sign and seal this their bill of exceptions, which is accordingly, as aforesaid, done.

16 The witness, Mrs. Mary S. Heineke, further testified as follows upon further direct examination:

Q. Just state, Mrs. Heineke, what conversations you had with Mrs. Carpenter with reference to your uncle's will or the codicil.

A. Well, she said one day that she had asked Uncle Wes how he had made his will. She told me that she had asked him if he had left us all alike in making a will, and he said he had, all his nieces and nephews. That is all the conversation I had with her about the will (p. 54).

This same witness testified further that she could not tell anything concerning the condition of the mind of the testator, but that she had several conversations with him, in which they talked on all subjects and in which he told her that he intended to leave some of his property to some of his nephews and nieces and to others he would leave none; that in one conversation he told her that he hoped she would not compromise or give any of her portion away and cautioned her very particularly about that; that he often helped those of his relations who needed help by paying their rent for them and giving them money; that the testator took charge of and settled his brother Frank's estate at his death; that he said he was going to fix his will so that it could not be broken and that the beneficiaries under it would get what was coming to them; that on two occasions she went as far as the car with him, when he told her he was going to Mr. Edmonston's office regarding his will; that after the death of Francis E. Hauptman she never saw any of the caveators at the testator's house, although all but two of them lived in Washington.

This witness further testified as follows:

Q. When did you ever hear his mental capacity questioned?

A. When did I ever hear it?

Q. Yes; and by whom?

A. I do not know when I ever heard of it except here lately.

Q. You never heard of it in his lifetime, did you?

A. No, sir.

Q. How many people did you know that knew him?

A. I guess nearly everybody I knew pretty much knew him.

Q. You never heard anybody question his mental capacity until after his death?

A. No, sir.

Q. Did you ever hear anybody question it then except those trying to break the will?

A. No; I do not think I have (p. 91).

Q. You state he talked with you about what he was going to do with his property—that is, he was going to leave something to some people and nothing to others? Which ones did he tell you he was not going to leave anything to?

A. To those that had filed a caveat.

17 Q. Those who had antagonized your uncle Frank's will?
A. Yes.
Q. What did he say about those that had made the fight on the first will?
A. He always said he was not going to leave them anything; that he was going to cut them out.
Q. What did he say about the others?
A. That he was going to leave them something. He didn't say what or how he was going to do it. He didn't say whether he was going to make them all equal or not.
Q. But he was going to leave something to all but those who made that fight?
A. Yes, sir (p. 92).

And the caveators, further to maintain the issues on their part joined, introduced as a witness Dr. NORMAN R. JENNER, who testified that he was a practicing physician in the District of Columbia and had graduated in 1890.

That on one occasion, at the request of Dr. George N. Perry, he called professionally to see the testator; that this was about eighteen months prior to the trial; that he found him in a dazed condition—such a condition as he would expect a man to be in who was recovering from a spasm or an epileptic fit; that epilepsy does not frequently begin in persons from the age of 55 to 65, but is most frequently manifested prior to 14 or 15 years of age; that he has not had any considerable experience with epilepsy; that at the time he called upon the testator he saw nothing to indicate but that the testator's mind was all right; that the testator answered intelligently all questions that the doctor propounded to him, and witness saw no indication that his mind was unsound.

And the caveators, further to maintain the issues on their part joined, *proceeded* and had sworn and examined as a witness on their behalf Dr. GEORGE B. HEINECKE, who swore in substance as follows: That he was about thirty years of age; a practicing physician in the city of Washington since 1892; that he was a grandnephew of the testator and a son of Mary S. Heinecke, one of the caveatees and residuary legatees of Charles W. Hauptman; that he had known the testator ever since he could recollect, and had seen him about once a week, more or less, during that period and up to his death; had seen him when recovering from attacks of epilepsy, but subsequently to the execution of the will and codicil; that testator had stated to him that he was a sufferer from urethral calculus; that on the 13th of March, 1896, he had seen the testator have a fainting spell; that toward the latter part of the testator's life when he would go to visit the testator he would usually find him in the sitting-room or in the shop; that he had on one occasion seen testator laughing to himself; that on or about the 13th of February, 1899, during the blizzard, the testator acted peculiarly about the snow in his
18 yard; did not know how it got in there, all of it, and went out there and tried to get it removed; that witness knew a

good many people who were affected by that snow; that upon the day after the death of the testator he was present with four other physicians when the post-mortem examination of the testator's brain was made; that testator's brain was pale—atrophied—and the arteries of the brain extremely atheromatous; that the cause of the death of the said testator was anæmia or arterial sclerosis; that thereupon the caveators, by their counsel, propounded to the said witness the following question:

Q. Doctor, have you formed any opinion, from your uncle's general condition of health and the conditions disclosed by his brain at this investigation, and from all that you know about him yourself, what his condition of mind was?

To that portion of which question which called for an opinion from the witness from "all that you know about him yourself" the caveatees objected on the ground that no sufficient basis had been laid for that portion of the said question, and that the facts relied upon in this particular should be first adduced, and the court sustained their objection; to which action of the court sustaining said objection and refusing to allow the counsel for the caveators to put the same or the witness to make answer thereto the counsel for the caveators excepted, and prayed the court to note their said objection upon its notes, which is accordingly done before the jury retire, and to sign and seal this his bill of exception, which is also accordingly done, as aforesaid.

The witness Dr. Heineke further testified as follows:

Q. Did he have any other ailment—any ailment of the urinary organs, as far as you know?

A. Only what he said.

Q. I say, what he said or what you say.

A. He has trouble with urethral calculi, or passage of stones from the kidney to the bladder.

Q. Do you know what causes that trouble usually, Doctor?

A. It is a matter of a good deal of dispute.

Q. What is your opinion about it, if you have any?

A. It is a deposit that is a condition of the blood, perhaps, or a deposit from which this secretion is passed, and forms into calcareous matter in the kidneys, and then passes from there into the bladder, and then out.

Q. Do you think that might possibly have any effect upon the disintegration of the brain?

A. I cannot connect that; no, sir (p. 153).

And this witness further testified that atrophy is one of the invariable results of old age in possibly from fifty years of age up; that the liver, the kidneys, and most of the organs atrophy with advancing years, and that the brain is one of the first and most gen-
19 eral of the organs to atrophy from mere old age without any disease; that this condition of atrophy occurs between fifty

years and advanced age, and in a vast majority of cases between the ages of sixty and seventy years; that the increase of the subarachnoidal fluid resulting from atrophy of the brain is a normal and natural condition; that as the brain atrophies with increasing years this fluid increases and fills up the space; that the thinking portion of the brain is the cortex of the gray matter in the upper part of the brain.

And the caveators, further to maintain the issues on their part joined, offered to prove by Dr. ROBERT SCOTT LAMB substantially as follows: That he is a practicing physician in the city of Washington and has been such since August, 1898; that he is the son of Dr. D. S. Lamb, who is a pathologist at the United States Medical Museum; that he was present on the third of May, 1899, the day after the death of the testator, when a post-mortem examination of the brain took place; that he never saw the testator during his lifetime; that he, together with his father, Dr. D. S. Lamb, Dr. E. A. Balloch, Dr. George F. Perry, and Dr. George B. Heineke, were all present; that he assisted in performing the operation; that the accompanying record of the result of said autopsy is a true and correct record thereof:

Report of Autopsy.

MAY 3RD, 1900.

Dr. G. N. Perry, Wash., D. C.; Drs. D. L. & R. S. Lamb.

Charles W. Hauptman; age, 61 years; died May 2nd, 1899.
Necroscopia, limited to head.
Artery of brain extremely atheromatous, stiffened, brittle, standing wide open when cut, brain generally atrophied and pale; increase of subarachnoidal fluids, lateral ventricles dilated; some small cysts in left internal capsule and optic thalamus; a few small cysts in centrum ovale majus; cause of death, anaemia of brain.
Brain not kept.

That in the opinion of the witness the brain of the testator was rather unhealthy; that the disease from which he was suffering, in the opinion of the witness, had been progressing for from eight to ten years prior to death. Witness was then asked by counsel for the caveators "Whether, in his opinion as an expert physician, from the appearance and general condition of the brain of testator, it was possible to form a judgement as to the mental capacity of the testator on the 30 day of November, 1896, and also on the 15th day of April, 1898; and, if so, what that opinion was;" to which question and the propounding thereof the caveatees, by their counsel, objected, and the court then and there sustained their objection, on the ground that the said witness had not been shown to be an expert upon said subject-matter; to which ruling of the court sustaining the said objection and refusing to permit the said question to be pro-
20 pounded and an answer thereto to be given by the witness the caveators, by their counsel, then and there excepted and prayed the court to note their exception upon his notes, which was

accordingly done before the jury retired, and prayed the court also to sign and seal this their bill of exception, which is accordingly done, as aforesaid.

And then the said caveators, by their counsel, interrogated the said witness, Dr. Robert Scott Lamb, who answered substantially as follows: That while a student of medicine, and subsequent to his graduation, he had seen possibly 250 cases not relating to diseases of the brain, but in which it was involved to some extent, more or less; that he had been a student of the hospitals in Baltimore, Philadelphia, and New York; that he had seen a good deal of brain surgery; that he had not performed many operations himself, but had been present and seen them performed.

This witness further testified that the cases of brain surgery that he had witnessed in Philadelphia were seen by him after he had graduated, when he was going from hospital to hospital to study his profession, and that he had gone there of his own accord to witness surgical work and remained there three months; that during this period of time he was connected with no medical institution in Philadelphia, but was simply what was known as a man "visiting hospitals for the sake of research work."

Q. Did you witness any operations there to determine the mental capacity of a man who had an atrophied and pale brain and atheromatous arteries?

A. No, sir.

Q. What was there about these experiments or these operations that you witnessed in Philadelphia which would throw any light upon the mental condition of a man who had what is described in this record here, and the length of time that they would have affected his mind?

A. I do not know that there was anything.

This witness further testified that he had visited New York and Baltimore, where he obtained the same experiences he had in Philadelphia.

Thereupon caveators, by their counsel, insisted to the court that the said examination of the said witness demonstrated that the said witness was an expert in such matters, and that his testimony and opinion was competent evidence to go to the jury for what it was worth, and again offered to propound to the said witness the said question as to his opinion of the mental capacity of the said testator on the days of the dates of the execution of the said last will and codicil respectively; but the court still held that the said witness, Dr. R. S. Lamb, was not sufficiently qualified as an expert in such matters *as* to be competent to give an opinion proper to be submitted to the jury, and refused to permit said question to be asked or the said witness to answer the same; to which
21 ruling of the court sustaining the objection of the caveatees, by their counsel, as to the competency of the said witness, Dr. R. S. Lamb, as an expert, and the refusal to permit his opinion to be stated to the jury, or the question, for the purpose of eliciting the same, to be propounded to said witness, the caveators, by their

counsel, duly excepted and prayed the court to note their exception upon his notes, which is accordingly done before the jury retire, and prayed the court to sign and seal this their bill of exception, which is also done accordingly as aforesaid.

And for further ground of exception the caveators show that at the beginning of the trial of the issues in this cause the court passed an order constituting the caveatees plaintiffs and the caveators defendants, as will appear by reference to said order in the record in this cause.

Whereupon the said caveatees offered in evidence the last will and testament and codicil of the said Charles W. Hauptman, and proved the execution thereof by the serviving witnesses thereto, and rested, the said will and codicil being as follows:

In the name of God, amen;

I Charles W. Hauptman of the city of Washington in the District of Columbia, being of sound and disposing mind memory and understanding do make publish and declare this paper-writing as and for my last will and testament, in manner and form following, that is to say—

Item first. To my dearly beloved sister Mary E. Hauptman, who resides with me, I give and bequeath all my clothing wearing apparel, watches, furniture, plate and other household effects to be taken and disposed of as her absolute property, and in case she should not survive me, I give the same to the person or persons acting as executor or executors of this will to be disposed of in his or their discretion.

Item second. To my said sister Mary E. Hauptman if she survives me, I give devise and bequeath during her natural life the rents issues and profits of all the real estate of which I shall die seised or possessed, and the interest dividends, coupons and other income arising from all the personal estate other than that mentioned in said item first, of which I shall die possessed, or to which I shall be entitled at the time of my death; and I will and direct that the executor or trustee for the time being, acting in the execution of this will, shall collect the rents and profits of said real estate and the interest dividends, and other income from said personal estate, and pay such rents, profits, dividends and other income to said Mary E. Hauptman for her own use and benefit, so long as she lives, as said income is collected, or at such stated intervals of time, of not less than one month each, as may be satisfactory to said Mary E. Hauptman after first deducting from such income, all proper taxes, rates, assessments, charges, and expenses, including a commission on such collections of seven per centum. Upon and after the death of my said sister Mary E. Hauptman, or upon my death, if I shall servive her, it is my desire and I do so direct that all the real estate of which I shall die seised, and all of the personal estate, of which I shall die possessed, except what is mentioned in the said item first of this will, shall be sold and disposed of absolutely and in fee-simple at public or private sale as soon as practica-

Charles W. Hauptman.

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ble by the executor, trustee or trustees acting in execution of the trusts of this will, and for the purpose of making such sale and disposition and completing the same I do hereby authorize and empower the executor or trustee or trustees, for the time being, acting in the execution of the trusts hereby created to make execute and deliver all deeds, conveyances or other instruments of writing deemed necessary or advisable; and I do will and direct that a purchaser from such executor or trustee shall be under no obligation to see to the application of the purchase-money. The purchase-money arising from such sales, and all income arising from said real and personal property after the death of the said Mary E. Hauptman and before a sale of said real and personal property, shall after paying from said proceeds of sale the usual and proper expenses of the sales hereinbefore authorized be used and applied in paying and satisfying the legacies hereinafter given, none of which however are to be or become payable while my said sister Mary E. Hauptman lives, and each of the hereinafter-contained items are to be construed as if a provision was inserted in each item, that the legacy or legacies therein given, should be payable only after the death of the said Mary E. Hauptman.

Item third. To my dear sister Helen C. Carpenter, who now resides in Artesia in Los Angeles county, State of California, I give and bequeath the sum of six thousand dollars, and in case, she shall die before I do, or before the said sum becomes payable to her under the terms of this will, I give and bequeath the said sum to her child or children or other descendants to be equally divided among them, if more than one *per stirpes* and not *per capita*.

Item fourth. To David Lomax a colored man who formerly lived with my family, I give and bequeath the sum of three hundred dollars in recognition of his faithful services.

Item fifth. To the trustees who shall at the time of the sale hereinbefore provided for be acting as trustees of the Foundry Methodist Episcopal church or chapel which is erected at the northeast corner formed by the intersection of Fourteenth and G streets northwest in the city of Washington in the District of Columbia, I give and bequeath the sum of twelve hundred dollars of which amount I wish five hundred dollars to be used in the discretion of said trustees for the benefit of the church and five hundred dollars to be used in the discretion of said trustees for the benefit of the Sunday school, connected with said church, and two hundred dollars to be used in the discretion of the said trustees for the benefit of the poor of the congregation of said church.

Item sixth. To the Missionary Society of the Methodist Episcopal Church, incorporated by the State of New York, I give and bequeath
the sum of five hundred dollars, and the receipt of the treas-
23 urer for the time being of said society, shall be a sufficient
discharge to the executor or trustee acting in the execution of the trusts of this will.

Item seventh. To "the Board of Church Extension of the Methodist Episcopal Church, incorporated by the legislature of the State of Pennsylvania, I give and bequeath the sum of five hundred

dollars and the receipt therefor of the treasurer for the time being of said society shall be a sufficient discharge to the executor or trustee acting in the execution of the trusts of this will.

Item eighth. To "the Methodist Home of the District of Columbia," incorporated under the laws in force in the District of Columbia, I give and bequeath the sum of five hundred dollars, and the receipt of its treasurer for the time being shall be a sufficient discharge to the executor or trustee acting in the execution of the trusts of this will.

Item ninth. To "the Central Union Mission," incorporated under the laws in force in the District of Columbia, I give and bequeath the sum of two hundred dollars, and the receipt of its treasurer for the time being shall be a sufficient discharge to the executor or trustee acting in the execution of the trusts of this will.

Item tenth. To "the American Bible Society" formed in New York in the year 1816, I give and bequeath the sum of two hundred dollars, for the use and benefit of the Washington City Bible Society and the receipt of the treasurer for the time being of the last-named society shall be a sufficient discharge to the executor or trustee acting in the execution of the trusts of this will.

Item eleventh. To the "Woman's Home Missionary Society, a corporation, under the laws of the State of Ohio, I give and bequeath the sum of five hundred dollars for the use and benefit of "the Lucy Webb Hays National Training School, Deaconess Home, and Sibley Memorial Hospital located in the city of Washington District of Columbia, and the receipt of the president for the time being of the last-named institution shall be a sufficient discharge for said sum to the executor or trustee acting in the execution of the trusts of this will.

Item twelfth. To the Washington City Orphan Asylum a corporation created by act of Congress and whose buildings are at the corner of 14th and "S" streets northwest in the said city of Washington, I give and bequeath the sum of two hundred dollars, and the receipt of the treasurer for the time being of said asylum, shall be a sufficient discharge to the executor or trustee acting in the execution of the trusts of this will.

Item thirteenth. To "the American University" a corporation under the act of Congress, approved February 24th 1893, I give and bequeath the sum of five hundred dollars.

Item fourteenth. After the payment in full of the legacies hereinbefore given in items numbered consecutively from third to thirteenth both inclusive and of the expenses of sale I will and direct that the residue of the proceeds, arising from the sales, which I have hereinbefore authorized and directed to be made, shall be
24 divided in equal shares among, and I do hereby give and bequeath the said residue share and share alike to my following-named nieces and nephews, viz: Mary S. Heinecke, Helen K. Bremerman, Edmund H. Brown, Mary E. Perry, William F. Brown William C. Hauptman, Mary M. King, Lloyd Douglass, Caroline Watson, Mary B. Tracy, John D. Hauptman, Clinton C. Hauptman, and Clara B. Hauptman, subject to the provision hereinafter con-

tained as to the share or shares of any one or more of said nieces or nephews, who may be unable by reason of the claims of creditors of such niece or nephew to receive personally in her or his own hands the share intended for her or him; and if either of said nieces or nephews shall die before being paid her or his share of said residue, and shall leave a child, children or other descendants surviving her or him, the share of the one so dying shall be paid to such child, children or other descendants and if more than one to them share and share alike *per stirpes* and not *per capita*, but if any of said nieces or nephews shall die before her or his share of said residue is paid to her or him and shall leave no child or other descendants then surviving the share of the one so dying shall be divided among the survivors of said above-named nieces and nephews living at the time said residue is divided; and in case the share hereinbefore given to any niece or nephew cannot be paid into her or his own hand, by reason of any claim or claims of any creditor or creditors of such niece or nephew, then I hereby authorize and direct that the share otherwise hereinbefore given to such niece or nephew, shall be paid to her or his child or children, or husband or wife, as the case may be, if any, in the discretion of the executor or trustee acting in the execution of the trusts of this will or in the like discretion, applied by such executor or trustee for the support and maintenance of such niece or nephew against whom such claims may exist. Should any one or more of the legacies given or intended to be given in and by the items hereinbefore numbered, consecutively from third to thirteenth both inclusive, for any reason whatever, fail or become ineffectual, it is my wish and desire and I do so direct, that the sum or sums representing the legacy or legacies so failing shall become and form part of the said residue and be distributed in the manner and among the persons among whom I have in this fourteenth item directed the "residue" therein mentioned to be distributed, and subject to all the provisions hereinbefore contained in reference to the payment of said residue. Should it become necessary or advisable in the opinion of my executor or trustee for the time being acting to change any of the investments in personal property left by me, I hereby authorize and empower such executor or trustee to make such change by sale or otherwise, and reinvest the proceeds in other income-producing securities, which are to be held and disposed of upon the like uses, trusts and provisions hereinbefore declared as to the personal property left by me.

Item fifteenth. I do hereby nominate, constitute and appoint my friend William E. Edmonston of the city of Washington and District of Columbia to be the executor and trustee of this my
25 will, and in the case of his death or in case of his inability from any cause to act or to continue to act as such executor and trustee, before the trusts of this my will shall be fully executed and performed, then and in either case I do nominate, constitute and appoint my friend Edward T. Kaiser to be the executor and trustee of this my will, with all the same powers and authorities to all intents and purposes, as said Edmonston had or might have under and by virtue of this my will, and I do hereby revoke, all

wills and testaments heretofore made by me, and ratify and confirm this and none other, as and for my last will and testament.

In testimony whereof I the said Charles W. Hauptman to this my last will and testament have set my hand and seal on this thirtieth day of November in the year of our Lord eighteen hundred and ninety-six.

CHARLES W. HAUPTMAN. [SEAL.]

Signed, sealed, published, and declared by Charles W. Hauptman, the above-named testator, as and for his last will and testament in our presence, who, at his request, in his presence and in the presence of each other, have hereunto set our names as subscribing witnesses on this 30th day of November, A. D. 1896.

J. D. COUGHLAN,
500 *Fifth St. N. W., Washington, D. C.*
CHAS. E. VAN ARSDALE,
500 *5th St., Washington, D. C.*
JAY C. HOWELL,
500 *5th St., Washington, D. C.*

Codicil.

I Charles W. Hauptman do hereby make this as a codicil to my last will and testament bearing date the thirtieth day of November in the year 1896, every part whereof, I do hereby ratify and confirm, except as changed by this codicil, and I do hereby give and bequeath to my sister Helen C. Carpenter, if she survives my sister Mary E. Hauptman, the sum of ten thousand dollars, this bequest being in addition to the bequest to her of six thousand dollars, contained in said will, should said Helen C. Carpenter not survive said Mary E. Hauptman, the legacy given by this codicil shall lapse and become part of my residuary estate.

In testimony whereof I the said Charles W. Hauptman to this codicil to my last will and testament have set my hand and seal on this fifteenth day of April in the year of our Lord eighteen hundred and ninety-eight.

CHARLES W. HAUPTMAN. [SEAL.]

Signed, sealed, published, and declared by Charles W. Hauptman, the above-named testator, as and for a codicil to his last will and testament, in our presence, who, at his request, in his presence
26 and in the presence of each other, have hereunto set our names as subscribing witnesses on this fifteenth day of April, A. D. 1898.

J. D. COUGHLAN,
500 *Fifth St. N. W., Washington, D. C.*
JAY C. HOWELL,
500 *Fifth St. N. W., Washington, D. C.*
MARIE LOUISE CARUSI,
500 *Fifth St., Wash., D. C.*

The caveators thereupon produced and examined as a witness in their behalf Dr. D. S. LAMB, who testified substantially as follows:

That he is a physician and for twenty-five or thirty years has been the pathologist in the Army Medical Museum; that he has made a good many post-mortem examinations, and that he performed the autopsy in this case; that the testator's brain was somewhat atrophied and pale; there were some small cysts, and the arteries in an atheromatous condition; that he has found similar conditions of the brain as early as fifty and as late as eighty or ninety years.

On cross-examination this witness testified that the atrophy or shrinkage was about general; that there was no particular place in which it appeared more evident than in others; that he would not undertake to say that the testator was of unsound mind or incapable of transacting business; that generally it is one of the functions of old age to contract or atrophy all of the organs of the body; the brain, the lungs, and nearly all the organs of the body are shrunken by age; that it is not possible to tell from such an examination as was made of this brain, where the condition is a general wasting, whether the mind was sound or unsound; that cysts are simply cavities filled with some fluid, and that he found small cysts in the left internal capsule and the left optic thalami and the centrum ovale majus; that a brain has two hemispheres, the right and left; that in these hemispheres is the seat of intellect which governs the intellectual or perceptive faculties of the mind; that paralysis entirely of one of the optic thalami would have no effect at all on the intellectual faculties, except perhaps a sort of reflex effect like any injury would; that he did not find anything in the condition of the brain of the testator not due to the ordinary changes of advancing age; that all the conditions present were what advancing age would naturaally produce; that the testator's was not a case of premature old age; that the arachnoid is the membrane which covers the brain, and in a normal condition there is a certain amount of fluid between it and the brain proper; this amount of fluid was increased by reason of the atrophy of the brain; that from the condition of a brain like the testator's apoplexy would possibly have happened to the patent, but men who die of apoplexy are not necessarily of unsound mind up to the time of the attack; that it is the gray matter which forms the thinking part of the brain.

27 And the caveators, further to maintain the issues on their part joined, produced as a witness Dr. HOWARD H. BARKER, who testified that he was a practicing physician in Washington for about thirty years; that he had attended the testator, Charles W. Hauptman, as his family physician; that the testator called at his office in June, 1892, suffering with urinary calculus in his urethra; that a few months before this visit witness had operated upon the testator for this same malady; that the testator never had any epileptic attacks, so far as witness knew, while he attended him, and that the testator in addition to this urinary trouble had bowel disease.

This witness further testified as follows:

Q. I suppose, Doctor, you have a good many patients who have both calculus and diarrhœa?
A. Yes; occasionally.
Q. Do you regard those diseases as indications of mental unsoundness?
A. No, sir; I do not.
Q. It is a fact, is it not, that many men of the highest intellect and mental powers have this stone in the bladder?
A. Certainly (pp. 141, '2).

This witness further testified as follows:

Q. Doctor, your professional connection with Mr. Hauptman extended, if I understand you, from about the 1st of 1892 to April, 1898?
A. Yes, sir.
Q. During that time, if I understand you, the only indications of disease you knew anything about were the intestinal, kidney, and bladder affections?
A. Yes, sir.
Q. You never saw anything else wrong with him?
A. No, sir.
Q. Either mentally or physically?
A. No, sir (p. 146).

The caveators, further to maintain the issues on their part joined, produced as a witness one Dr. EDWARD A. BALLOCH, who testified that he was a practicing physician in Washington for the last twenty-one years; that he saw the testator once at the office of Dr. George N. Perry, at 1316 Q street N. W., in the early part of May, 1898; that he was called into consultation by Dr. Perry to attend the testator; that Dr. Perry simply told witness that the testator had had some kind of a convulsion of epileptic form and nature, and that he was a little worried; that he was also present on the third day of May, 1899, when the post-mortem examination was held.

This witness, when interrogated concerning the record of the autopsy, testified as follows:

28 Q. What would that indicate, a healthy or a diseased brain?
A. Diseased, I should say.
Q. Badly diseased or slightly diseased?
A. Slightly, in my judgment.
Q. Slightly diseased?
A. Yes, sir (pp. 186, '7).

This witness further testified as follows:

Q. Does a slight- diseased brain necessarily involve any want of ordinary business capacity?
A. Not in itself (pp. 192, '3).

Q. There are some diseases of the brain which will not affect the mind at all, are there not?

A. Yes, sir.

Q. Such as those affecting the organs of motion or the senses, termed the sensory tracts?

A. Yes, sir.

The caveators, further to maintain the issue on their part joined, produced the witness Dr. GEORGE N. PERRY, who testified that he was the husband of a niece of the testator; that he had seen a good deal of the testator during his life, both in the capacity of physician and as one of the members of the family; that it was only in the late years of his life that witness attended the testator professionally; that he attended him in his last illness; that the testator never consulted witness professionally for any serious ailment; that when witness was there occasionally he would speak to him of some slight trouble, for which witness would give him something; that the testator told witness that he had urinary trouble; that witness had seen the testator when he had epileptic fits on two occasions, once in his office and once at the testator's home, the fit at his home occurring in December before he died, the other fit taking place in the witness's office, on the 9th of May, 1898; that witness was present at the post-mortem examination made on the brain of the testator, the examination having been made at witness's request, from a scientific or medical standpoint, to ascertain the cause of the convulsions; that testator had been confined to his bed possibly a week or ten days before his death.

This witness further testified as follows:

A. With the exception of these attacks which he occasionally had—these convulsions which he occasionally had—he appeared to be as well as usual. With that exception, until after his sister's death, which occurred—I cannot give the exact date, but I think in January previous to his death, he failed rapidly after that. It was not so apparent for possibly a month or six weeks, although he was failing then, but he failed very rapidly in the last few months of his life.

Q. He had been failing before that, had he not, as a consequence of these attacks of epilepsy?

A. I think not, sir (pp. 231-'2).

29 The witness further testified as follows:

Q. Doctor, can you not recall any other of these epileptic attacks than the ones which you have described?

A. I cannot positively. I am positive of none prior to May 9th, 1898. That was the first knowledge I ever had of any convulsions. He had several—how many I will not say—between that and his death; possibly four, five, or six (p. 241).

The witness further testified as follows:

Q. What effect on the mental soundness of a man has that urethral calculus or the operation which is to relieve it?

A. None whatever (p. 244).

The witness further testified that during the last few years of his life he had frequent conversations with the testator on general subjects; that on one occasion witness told the testator that he intended investing in a house, and that the testator gave him his opinion in the matter, with reference to the price, etc.; that witness gave him a description of the house, its location, and its price, and asked the testator if he thought it would be a safe and judicious investment to make; testator advised witness that he thought it would.

This witness further testified concerning conversations which he had had with the testator in reference to the trouble between himself (the testator) and the caveators who had contested his brother's will; testator was very much exercised and provoked over the action of the caveators, and said that if he were a younger man, ten years younger, he would never have compromised the case.

This witness further testified as follows:

Q. What, if anything, did he say to you about what he considered the deserts of those persons who made that attack on him in regard to his own estate—his own property?

A. After the settlement?

Q. Yes, sir.

A. He repeated to me that he did not want any of them to have a single dollar of his money after he died.

Q. Now, from your different conversations with him on these subjects during the time after his brother's death, did you form an opinion as to his mental character and capacity?

A. I always had one opinion.

Q. You did form one, then?

A. Yes, sir.

Q. What was that opinion?

A. That he was perfectly sound and rational.

Q. Up to what time?

A. Within a short time before his death; within the last three months of his life. It is impossible to say when rationality would end and irrationality would begin (249).

This witness further testified as follows:

Q. Suppose a man has his first epileptic attack or epileptoid convulsion on the 9th of May of any given year, what light would that throw upon his mental soundness in the preceding month?

A. None whatever. It would have no effect (p. 252).

The caveators thereupon produced as a witness one WILLIAM E. EDMONSTON, who testified that he is the president of the Columbia Title Insurance Company, and is the William E. Edmonston who is named as the executor of the last will and testament of Charles W. Hauptman; that he prepared a will for the testator on the 19th of March, 1896, and before that time prepared no other will for him; that he prepared a will for him on the 30th of November, 1896; that to the witness's knowledge the testator, between the 19th of March

1896, and the 30th of November of the same year, executed no other will; that on the 15th day of April, 1898, he executed a codicil to the will; that, as collector appointed by the court to take charge of the testator's estate pending this litigation, witness obtained fifteen or sixteen hundred dollars from a box at the National Safe Deposit Company, at the corner of Fifteenth and New York avenue; that witness found the will as well as other securities in the same place; that the first will which witness prepared for the testator, namely, the will of March 13th, 1896, was executed before certain of the testator's nephews and nieces had contested the will of his (the testator's) brother, and was canceled by the testator; that the testator of his own volition gave directions to the witness as to what he wanted his will to contain, the directions for the drafting of the first will having been given verbally, and in the case of the second will the directions were partly in writing and made by the testator.

The caveatees thereupon offered in evidence the written memoranda given to this witness by the testator, which are in the words and figures following:

$6,000. Sister Helen C. Carpenter, Artesia, Los Angeles county, California.
Mary S. Heinecke.
H. Kate Bremerman.
Edmund H. Brown.
Mary E. Perry.
William F. Brown.
William C. Hauptman.
Mary M. King.
Lloyd Douglass.
Caroline Watson.
Mary B. Tracy.
John D. Hauptman.
Clinton C. Hauptman.
Clara B. Hauptman.
David Lomax, $300.
Foundry Methodist Episcopal church, cor. 14th & G, $500. Sunday school of the same church, $500. Missionary Society of
31 the Methodist Episcopal Church situated at New York city, $500. The Board of Church Extension of the Methodist Episcopal Church, $500. The Methodist Home of the District of Columbia, 500 dollars. Washington City Bible Society, $200. Sibley Hospital of Washington City, D. C., 500. Central Union Mission of Washington City, D. C., $200. Washington City Orphan Asylum, cor. 11th & S St., $200. American University, Bishop John F. Hurst, president, $500. For the poor of Foundry M. E. church, $200.

This witness further testified that the reason the gift to the Sibley Hospital of Washington, D. C., was given by the will to the Lucy Webb Hayes National Training School was because it was found

that the hospital was not incorporated at the time, this information, at witness's direction, having been ascertained by the testator, the letter to the latter, dated November 27, 1896, furnishing this information being offered in evidence by the caveatees.

With reference to the instructions given witness by the testator for drafting his will, the witness further testified as follows:

Q. I will ask you whether, in connection with those instructions, the testator, Mr. Hauptman, discussed with you or conferred with you upon the subject of the contest of his brother's will and said anything about these persons in that connection.

A. Yes; he said he wanted to give those who had stood by him the residue of his estate.

Q. Is there or is there not among those thirteen persons one about whom he expressed to you some question or some hesitancy in that connection?

A. Yes; there was one.

Q. Which one was that? Please tell us all about that.

A. That was William C. Hauptman. He said he thought at first William C. Hauptman was against him, but he had come around and disclaimed contesting or being a party to the contest of his brother Francis's will, and that he let him in (pp. 268–9).

This witness further testified that the plan of settling the shares of any of the testator's nephews and nieces who were in embarras-ed financial circumstances in trust for them rather than devoting them to paying the claims of other persons was originated by the testator, the testator stating to the witness that one of the heirs, William C. Hauptman, was financially involved, and that he (testator) did not want his share to go to his nephew's creditors. This clause was suggested by the testator and added after the original will was drawn.

And the caveators, further to maintain the issues on their part joined, produced and had sworn and examined as a witness in their behalf Dr. Irving C. Rosse, who testified in substance as follows: That he has practiced medicine since 1866; that since 1882 he has confined his attention more particularly to nervous diseases involving the investigation of the human brain, including mental diseases; that he has studied his specialty in a number of schools
32 in this country and in Europe, and has testified as an expert in neurology a great many times in the courts of the District of Columbia, and has also qualified and testified in said courts as an expert in pneumonia; that the report of the post-mortem examination indicated, in his opinion, a diseased brain; that the disease was gradual and progressive, increasing rather than diminishing; had probably been progressing for from eight to ten years, and he should say it indicated an unsound mind; that the disease is called senile degeneration.

On cross-examination this witness testified that the features of the report of the autopsy which indicated the mental condition were, first, the atheromatous condition of the blood-vessels; that this does

not always involve mental unsoundness; that no particular part of the brain is the thinking part, or which is so recognized; that the gray matter is the thinking part, and this is all over the body; that he does not know whether there is any gray matter in the optic thalami; that he does not know what the function of the optic thalami is; that he does not know whether the optic thalami may be entirely paralyzed or removed without affecting the thinking portion of the brain; that the division of the brain into the right and left hemisphere is merely an arbitrary division which does not exist in nature; that one hemisphere of the brain might be entirely removed and the mind remain wholly preserved; that he knows of one instance where a hemisphere was entirely diseased and replaced by pus, and the man's mind was not unsound; that a man could carry around a cranium half filled with decayed and corrupted matter and still live, and without the suffering from septæcemia; that one side of the brain seems to be sufficient for the performance of the functions of the mental faculties; that memory, consciousness, and thought can all be operated in a perfectly normal way when one side of the brain is rendered incapable of performing its operations by disease or injury; that he does not know how many arteries feed the cortex of the brain; that an atheromatous artery would affect the mind very much like any disease would, very much like a mote in the eye; that the thickening of the arteries, reduction of the flow of blood, and consequent diminution of nutrition are not the only reasons why an atheromatous condition affects the mind; that he does not know any other way in which an atheromatous condition could affect the mind except through diminution of the blood supply, and that he neither concedes nor disputes the statement of the text-books that the autopsies in cases of sudden death not infrequently disclose that a greatly reduced circulation of the blood is sufficient to maintain the brain for ordinary purposes; that the next indication of mental unsoundness from the report of the autopsy was the general atrophy of the brain; that, as a general rule, whenever the brain is atrophied the mind is unsound; that age atrophies the brain as well as many other organs of the body; that the brain, liver, and the kidneys and most other organs become reduced in size
33 with advancing years naturally; that the brain shows marked atrophy from old age; that he is unable to say when atrophy of the brain from mere age begins; it may be 30 in one man or 60 in another; that he cannot tell any average at which it begins, not because the science of medicine has not fixed that limit in ordinary cases, but because the witness does not know; that he cannot tell within twenty years the time within which atrophy without disease is naturally to be expected; that the third reason for supposing there was mental unsoundness based upon the report of the autopsy is the existence of the small cysts on the left internal capsule and the left optic thalmus; that witness does not know the function of either of these parts of the brain; that he does not know whether there is any doubt as to either function in the medical profession or not, but he does not know what these functions are; that he does

not know the location of the optic thalami, and that in view of the fact that one whole side of the brain might be paralyzed and the mind remain unimpaired the existence of a few small cysts on one side, taken singly, would not indicate mental unsoundness; that most bodily ailments will affect the mind, and that a bad cold or a toothache, taken in connection with other things, would tend to confirm witness' impression of the testator's mental unsoundness.

The caveatees thereupon produced as a witness one CHARLES WHITE, JR., who testified that he had lived in the District of Columbia since 1879 and knew the testator very well, having known him from 1882 up to the time of his death; that he had visited testator at his house, seeing him about once or twice a month during the last three years of his life; that he had had many conversations with the testator in both business and social ways; that after the death of the testator's brother, Mr. Francis E. Hauptman, witness had an interview with the testator at the testator's house when he went there to condole with him. At this interview a question came up of bonds, and witness volunteered to bond the testator in reference to any matters connected with the estate of his deceased brother. The testator thanked witness very cordially and agreed to accept him as bondsman, if it was necessary. In some of these conversations which witness had with the testator the question of the contest of his (the testator's) brother's will arose, in which the testator told witness that he was determined to resist any effort on the part of any one to compromise the suit in reference to his brother's will, but was determined to contest it. The testator subsequently told witness that on account of his sister's (Mary) objections to having a contest take place over the will of testator's brother, Francis E. Hauptman, he had compromised the will. Witness further testified that he thought that the testator was a man of good business capacity, and that the witness had never observed in any of his conversations with the testator any acts or any conduct on the part of the testator indicating mental weakness or unsoundness.

This witness further testified as follows:

34 Q. From what you knew and saw of him, what is your opinion as to his capacity to make a valid deed or contract on either the 30th of November, 1896, or the 15th of April, 1898?

A. I think he was perfectly competent (p. 331).

This witness further testified that he met testator on E street on one occasion and conversed with him concerning his (the testator's) will; that the testator spoke in as extreme language as he generally employed concerning the parties who had opposed him in his brother Frank's will, his general habit being to use mild and moderate language.

The caveatees thereupon produced as a witness EDWIN POTBURY, who testified that he had lived twenty-eight years in the city of Washington, being engaged in the merchant-tailoring business, and that he knew the testator, Charles Wesley Hauptman, quite inti-

mately, and during the last three years of testator's life saw him perhaps every other day, sometimes at the witness's place of business and sometimes at the testator's home; that during this period of time he had conversations of both a business and social character with the testator; that witness also conversed with the testator about the latter's church, the Foundry Methodist church, testator being quite fond of talking about church matters; that testator took a great deal of interest in his church and its general prosperity, making contributions thereto; that down to within six or eight months of his (testator's) death he had business transactions with him, testator being a customer at witness's place of business.

This witness further testified as follows:

Q. From what you saw of him and your talks with him and your knowledge of him, did you form any opinion as to what his mental capacity was?

A. I always regarded him as first class in that respect—considered him a very bright man.

* * * * * * *

Q. It appears in evidence that he made a will in November, 1896, and a codicil in April, 1898, dying in May, 1899. From what you saw and knew of him and observed of him, what, in your opinion, was his ability to make a deed or a contract in November, 1896, and in April, 1898, which would be two years and a half and one year before his death?

A. I think, as far as my opinion goes, he was in first-class condition, then, sir, in every way (pp. 352, 353.)

The caveatees thereupon produced as a witness Mrs. CHARLES WHITE, JR., who testified that she is the wife of Charles White, Jr., whose testimony is given above; that she was acquainted with the Hauptman family all her life and knew the testator, Charles Wesley Hauptman, very well, being intimately acquainted with him down to the end of his life; that she saw testator during the last
35 two or three years of his life at least twice a week at his home; that during this period of two or three years she had many conversations with the decedent; that the testator spoke to her concerning the attack which his nephews and nieces were making at that time upon the will of testator's brother, Mr. Francis Hauptman, the testator, Charles W. Hauptman, expressing great surprise at this for the reason that his brother, Mr. Francis Hauptman, and himself had always aided the parents of their nieces and nephews on every occasion; that the testator spoke to witness concerning the making of his own will; that he had expressed great concern for his sister, Mrs. Carpenter, and that his brother, Mr. Francis Hauptman, and himself were very anxious to have her provided for, Mrs. Carpenter residing in California at the time.

This witness further testified as follows:

Q. What would you say was your opinion about his mental condition a year before he died?

A. I never doubted that at all. He visited in my house; came

and took dinner with us; came up the Christmas before he died. He spent the afternoon with us. I never regarded him as anything else but a very bright man. He was reserved—that is, he did not make many friends, was very modest, very retiring (p. 363).

The caveatees thereupon called as a witness Mrs. CAROLINE SPAULDING, who testified that she knew the Hauptmans for many years, being neighbors of theirs, and that she saw them very frequently; that she saw testator within six weeks of his death, and that quite frequently during the year testator would speak to her of things generally, the improvements of the city, and things that were going on; that testator spoke to her concerning the trouble that some of his family made for him over the will of his (testator's) brother, testator being very much troubled about it, and that witness always thought that the testator was right in his mind, and that there was nothing amiss with him.

The caveatees thereupon produced as a witness EDWARD T. KAISER, who testified that he was in the real-estate business in the city of Washington; that he had known the testator for a number of years, and that he had business transactions with the testator and his brother, Mr. Francis Hauptman, collecting the rents of their houses for them; that during the last two or three years of testator's life witness had had many business transactions and conversations with the testator in relation especially to the testator's property; that about a week before testator's death witness consulted him concerning an expired insurance on one of his properties; that outside of business matters witness had had many social chats with the testator concerning the topics of the day, the question of the income tax having been discussed by them; that witness from his several talks with testator and his business connection with him never saw anything unusual in the testator's actions; that witness considered him a competent man to do business, and that on the days that the will and codicil in this case were made, respectively, testator
36 was competent to execute them; that witness never observed anything in testator's actions that indicated any mental unsoundness or want of capacity to attend to his business.

The caveatees thereupon produced as a witness EDWARD F. SIMPSON, who testified that he had resided in the city of Washington for sixty-seven years and the balance of his life in Georgetown; that his acquaintance began with the testator over sixty years ago and continued until his death, witness and the Hauptmans being members of the same church; that witness was treasurer of the Foundry church, which the testator attended, and that he in that capacity knew that the testator made regular contributions to the church; that during the latter years of testator's life he had had a great many conversations with the testator concerning matters in which both were interested; that testator had spoken to witness concerning the trouble which testator's nieces and nephews had made over the will of his brother, Francis Hauptman, and that witness "never had but

one opinion about Wesley Hauptman's competency to transact business, and that is that he knew his own mind about everything he intended to do," and that, in witness's judgment, the testator was perfectly capable of making his will.

The caveatees produced as a witness CLINTON HAUPTMAN, who testified that he is a clerk at the Howard hotel, and that he was a nephew of the testator, being a son of George W. Hauptman, deceased; that he knew the testator all his life and had had many conversations with him, the last one taking place about a week before testator's death; that on one occasion testator spoke to witness about his (testator's) will and about the fight which his nieces and nephews were making on his brother Frank's will, testator stating to witness that he was going to cut them out of his will and was going to leave them nothing; that within two or three weeks of his death testator had given witness advice as to the most proper method of investing money, advising witness to invest his money in either gas-company stocks, or Government bonds, or in building associations; that the only reason he (testator) had compromised the will of his brother with his nephews and nieces was because he was getting old, and that, in witness's opinion, testator was perfectly sane.

The caveatees thereupon produced as a witness DAVID D. LOMAX, who testified that he came to Washington when he was eleven years and a half old and went to the house of Mr. Hauptman's family, by whom he was raised; that he learned the tinner's trade from the Hauptmans, who were engaged in that business; that witness remained with the family twenty-seven years; that after Mr. Frank Hauptman retired from business witness went in business for himself; that after leaving the Hauptmans he would call on the testator about twice a month, and the testator would call on him; that in the last few years of his (testator's) life witness was engaged as a domestic at the decedent's home; that the testator never told
37 witness how much he was going to leave him by his will, although he had told him (witness) that he had remembered him; that witness always thought testator to be a man of sound mind, and never saw him do or heard him say anything that did not seem rational.

The caveatees thereupon produced as a witness Mrs. HELEN C. CARPENTER, a sister of the testator, who testified that she had been living in California about twenty-five or thirty years, about twenty miles from Los Angeles; that the first time she saw the testator after she went to California was in 1887, at 407 Eleventh street, witness's visit here at that time lasting for six months; that the next time witness was in Washington was in 1896, at both of which visits witness saw her brother (the testator) and had many conversations with him; that from what witness saw of her brother (the testator) during her visit to Washington in 1896 he appeared perfectly sound and sane; that at that time the testator spoke to witness about his nephews and nieces who had contested his brother Frank's will

and admonished her never to compromise his (testator's) will with them, and saying that he was going to leave money with which to fight his nieces and nephews in case they attempted to attack his will; that under the compromise of Francis Hauptman's will witness had received $700, which, following the advice of the testator, she had invested, together with $300 given to her by the testator, making $1,000 in all, in a Government bond; that just before witness left California the last time, in 1899, for Washington, she received a letter from the testator asking her to bring with her the one-thousand-dollar Government bond which she had purchased, and which he had advised her to keep in a safe-deposit box, etc.; that testator had given $1,500 to witness with which to fight his nieces and nephews in case they fought his will, $1,000 of the $1,500 being invested in a bond, testator renting a safe-deposit box for witness to put her money in; that at the time the will and codicil were executed witness was in California; that when witness saw testator in 1899 he was as rational as she, and that there was nothing wrong with testator up to within a week of his death.

The caveatees thereupon produced as a witness Miss MAUD CARPENTER, who testified that she was the daughter of Mrs. Helen C. Carpenter, and that she came on with her mother to the house of her uncle, the testator, in 1896; that the witness and her mother stayed at the house of the testator at 407 Eleventh street, and during their stay witness saw testator every day, and found him perfectly capable of attending to all of his business and doing anything he pleased, witness seeing nothing in the testator's conduct or actions which was peculiar or out of the way; that witness saw testator the next time in March, 1899, when she and her mother came on from California, testator dying after witness and her mother had been here six weeks, and that witness noticed no change in the mental condition of the testator until one week before he died.

38 The caveatees thereupon called and examined as a witness in their behalf Dr. EDMUND L. TOMPKINS, who testified that he has been a practicing physician in the District of Columbia since 1885; that for the last eight or ten years he has made a specialty of nervous diseases; that he is professor of nervous diseases in the Columbian university and attending physician for the department of nervous diseases in the Emergency hospital; that he was also connected with the Hammond sanitarium for the treatment of nervous diseases; that he has studied the report of the post-mortem examination held in this case; that atheroma is a condition of the blood-vessels by which they become hardened and lose some of their elasticity; that this condition, to a certain extent, reduces the nutrition; that the brain usually grows smaller as a man gets older; that this condition is usually noted at from sixty to sixty-five years of age; that when the brain diminishes or atrophies the fluid fills the spaces which the brain filled before it contracted; that it is certainly a normal condition; that the grey substance of the brain at the top is the thinking part of the brain; that the

optic thalami are located at the base of the brain; that there is nothing obscure about their location; that there is no more doubt about it than there can be of the part of the leg the foot is on; that optic thalamus means "eye chamber," because it is shaped like the eye; that there are two optic thalami, one on each side; that should one of them be destroyed or paralyzed there would be a loss of sensation on the opposite side of the body from the one destroyed—that is, if the left optic thalamus becomes paralyzed the sensation is destroyed on the right side of the body, and *vice versa*; that this would have no effect on the intellectual or thinking power; that the existence of several small cysts on the optic thal-mus or on the internal capsule ought not to effect at all the thinking powers of the brain; that the internal capsule is a band of white matter which conveys motor or sensory sensations from the surface of the brain to the body; that it has nothing to do with the intellect; that the thinking parts of the brain are divided into two hemispheres, the right and left, which are counterparts or duplications of each other; that the thinking power would not be affected if one hemisphere was injured; that this division is a natural division and is not any less arbitrary and natural than the division of the lower part of the body into the two legs; that from the condition of the brain, indicated by the report of the autopsy, nothing could be said or determined about the testator's sanity; that the conditions disclosed by the autopsy would affect only the motor or sensory functions of the brain; that loss of the senses—hearing, feeling, sight, taste, and smell—does not impair the intellect; that in cases of general atrophy the intelligence is not usually affected; that general atrophy is not so bad as atrophy of any particular part; that the actions, behavior, and conversation of a person, as observable by his friends, relatives, and associates, are better tests of a man's mental soundness than the results of an autopsy exposing such conditions as this case presents;
39 that epileptic convulsions beginning a year prior to death would have no effect upon a man's sanity before the convulsions began; that a great many people have epilepsy all their lives and do not go insane; that there is no connection between urethral calculus and mental unsoundness; that there is no connection between toothache and mental unsoundness, and that there is no connection between a bad cold and mental unsoundness; that he never heard of toothache, a bad cold, or urethral calculus having anything to do with mental unsoundness; that he does not know of anything which could be taken in connection with a toothache or a bad cold to affect a man's mind.

On cross-examination witness further testified:

That the optic thalami are composed of grey and white matter mixed; that it is the grey matter in the cortex which affects and conveys thought, reflection, and memory; that there are certain portions of the grey matter in the spinal cord and in the lower portion of the brain, but that it has no effect on the memory or intellect; that he has had care of insane persons, and that he has made examinations of the brains of insane persons, and that he has never

found a similar condition of the parts of the brain of the persons he has examined that existed in the brain of the testator, as shown by the report of the autopsy; that he does not think that an atheromatous condition of the arteries indicates insanity; that anæmia means "diminution of the number of red corpuscles," and does not mean an absence of them entirely; that anæmia weakens the physical condition of the brain, but it does not affect the mental condition, unless the physical condition is "very, very much weakened;" that he saw nothing in the report of the autopsy that would make him think that the testator was of unsound mind; that anæmic conditions are very frequent among the human race; that a person who is not ruddy, who has a pale complexion, is called an anæmic; that such persons are not generally of unsound mind; that a great many persons are very pale, but attend to their business as usual.

The caveatees thereupon produced as a witness WILLIAM E. EDMONSTON, who testified that he knew the testator from about 1870 or 1871, seeing him quite frequently from 1896 to the end of his life and having quite a number of business transactions with him; that witness represented testator in the contest over the will of his brother, Francis Hauptman, and during the time the contest was going on he saw the testator two or three times a week; that while this contest was goin on he (testator) appeared to witness to be perfectly competent and sane. Witness "never had the slightest doubt about it."

The caveatees thereupon produced Dr. A. B. RICHARDSON as a witness in their behalf, who testified as follows:

That he has been a practicing physician of twenty-four years; that he was assistant physician at the Athens Asylum for
40 the Insane, at Athens, Ohio, and afterwards medical superintendent there; that in 1890 he practiced in Cincinnati in the special practice of nervous and mental diseases, and that in 1892 he was appointed medical superintendent of the Columbia State Hospital for the Insane, where he remained until 1898, when he was appointed medical superintendent of the Massillon State Hospital, in which position he continued until October, 1899, when he was appointed superintendent of the Government Hospital for the Insane at Anacostia, D. C., which is called St. Elizabeth's asylum, and that he still holds this position; that he was appointed as successor to Dr. Godding, who died in May, 1899; that during his entire practice his specialty has been mental and nervous diseases; that he has made and been present at a great many autopsies of the brain; that the localization of the parts of the brain is well known; that there is no doubt or obscurity regarding it; that the optic thalami are located at the base of the brain, on the under surface, in the line of the sensory tracts, and relate to the senses, either general or special; that the hemispheres of the brain are not arbitrary divisions, but exist in nature, and are very well marked, and that they are as distinguishable as the ears from the eyes in the face.

That the intellectual functions of the brain are located in the cell elements; that all demonstration location of diseased conditions found in mental diseases demonstrate that the cellular membranes in the cortex of the hemispheres are pre-eminently the location of the intellectual functions; that the internal capsule is made up entirely of transmission fibres, and their function entirely is to transmit impulses in one direction or the other; that it does not generate any form of energy, but simply transmits it; that it is made up of nerves entirely; that it has no connection with the thinking or intellectual part of the brain except to transmit actions which are the outgrowth of thought or intellectual purposes; that they bear the same relation that telegraph wires have to the cell in electrical combinations; that the grey matter found in other portions of the body has no bearing or connection with the seat of intellect, but it does have something to do with transmitting or multiplying or rearranging sensation; that the mere abstract functions of comparison, memory, reason, analysis, and deduction, which make up the purely intellectual functions, are certainly more distinctly localized in the antero or the anterolateral lobes, and the adjoining portions are the most frequent seat of small extravisations or obstructions in circulation in the exterior brain center, and these small obstructions or extravisations often occur without interfering with the mental functions; that the internal capsule may be damaged without interfering with the mental functions; that it, more than the optic thalami, often is the seat of these small extravisations—small ruptures of blood-vessels; that he has examined the report of the autopsy made of the brain of the testator, and from it it is not possible to tell whether the testator was of sound or unsound mind.

That atheroma is of two kinds, endero-arteris, which is ac-
41 companied by a thickening of the interior wall, and is the usual form of atheroma found in old persons and which affects chiefly the larger vessels, and perarteris, which affects the small arteries; that atheroma of the larger vessels is more frequent than the other, and in elderly persons it is very common to find a certain amount of this atheromatous change in the vessel walls; that this condition is much more commonly met with after sixty years of age than before that time, and is always found in old age, and in exceptional cases is found in children; that this, taken with the anæmic condition of the brain shown by the report of the autopsy, would not have any bearing at all upon the soundness or unsoundness of the mind of the testator; that the statement in said report that the brain was generally atrophied and pale would show that it was the brain of a person advanced in years, certainly beyond middle life; that general atrophy is found always in persons in later life, and would not have any significance in any degree as to the mental capacity of a person; that it frequently occurred that after forty years of age the brain begins to shrink some; that the brain may be more or less atrophied and the person not be said to be mentally unsound or even to have a diseased brain; that nearly all of the organs of the body begin to shrink and atrophy as age advances; that when the brain atrophies a compensating fluid

known as the subarachnoidal fluid appears and fills up the place formerly taken up by the brain; that it forms a kind of cushion around the brain, and has no effect on the intellect. It is not a disease; it is a natural consequence of atrophy, and is simply a compensating fluid; that the enlargement or dilation of the lateral ventricles is always due to and caused by the atrophy of the brain; the ventricle is simply a cavity on the inside of the brain; it has a certain amount of fluid in it always, and depending for its size upon the amount of loss of tissue in the brain; it is enlarged or increased as the brain atrophies; it is not a disease, except in so far as it discloses the amount of atrophy; that the existence of small cysts, as shown by the report of the autopsy, would not affect the intellectual functions of the brain, but only some of the other functions of sensation or motion or something of that kind, if they had any effect at all; that they may exist without having any visible effect; that the centrum ovale majus is made up of numerous fibres and contains no grey matter at all, and that the existence of cysts therein would have no effect upon the intellectual faculties; that one-half or one whole side of a person might be paralyzed without affecting the mind; that if a person about a year before his death is attacked with epilepsy and that during the year he had three or four similar attacks, they would be in themselves no indication at all of the person's mental condition; they would not be sufficient at all to draw any conclusion as to his previous mental condition; that epilepsy which develops in late life is not likely to produce mental disorder or be accompanied by it; that there is no connection between urethal calculus and mental unsoundness, and that urethral calculus is more frequent in persons who are sane than in those who are insane; that the conduct of an individual, his acts and
42 declarations to his neighbors, family, and others, must determine sanity or insanity in every case; that you cannot predicate the condition of mind of a person upon an examination of the brain after death; that it is in very rare cases indeed that you can see from examination of the brain after death whether the person was of sound or unsound mind; that he would not be able to give from the record of the post-mortem examination of this brain any opinion as to whether testator was of sound or unsound mind; that anæmia of the brain is a very common disease; that anæmic persons are not generally considered insane.

The caveatees thereupon produced as a witness ARTHUR G. COPELAND, who testified that he knew the testator from 1886 to the end of his life, witness's business during that time being next door to the testator's; that during this period witness saw testator every day, and had many opportunities of observing his behavior and actions; that, with respect to the testator's mental condition, witness "never doubted it," this opinion of witness not changing up to the time of testator's death; that witness never saw any vagaries or delusions of any kind on the part of the testator which would indicate any want of mental or business capacity.

The caveatees thereupon produced as a witness ALBERT G. HOLLAND, who testified that he knew the testator for about fifty-six years, to the end of his life.

The witness further testified as follows:

Q. From your knowledge and observation of him, and the conversations you had with him during his life, and particularly during the latter part of it, did you form any opinion about his mental capacity and business qualifications?

A. I never had occasion to. I was very much surprised when I learned it was questioned.

Q. Did you have any opinion about his mental capacity?

A. Why, I thought he was as sound a man as I am, mentally (p. 546).

The caveatees thereupon produced as a witness Mrs. ELLEN E. CLARK, who testified that she knew the testator all her life, and that from what she knew of the testator he was perfectly sane, witness never seeing anything on the part of the testator which was irrational or out of the ordinary.

The caveatees thereupon produced as a witness GEORGE BAUER, who testified that he is an inspector in the gas office and knew the testator all his life, seeing him every day during the last two or three years of his life; that during this period (the last two years of his life) testator gave witness advice on several matters, and that witness never saw any action on the part of the testator which led him to believe that he (the testator) was not of sound mind.

43 The caveatees thereupon produced as a witness JOHN COOK, who testified that he is the secretary of the Perpetual Building Association and knew the testator for the last three or four years of his life; that during this period witness had many conversations with him, testator having business transactions at the office of the Perpetual Building Association; that the business transactions which the testator had with the building association were conducted by himself (the testator), and that in the witness's opinion, judging from his observation of the testator during these last three years and the manner in which the testator conducted his business with the building association, the testator was a man of a perfectly sound mind.

The foregoing was all the testimony adduced at the trial of this cause.

To all of which evidence offered on the part of the caveatees tending to prove that at the time of the execution of his last will and testament by the said Charles W. Hauptman he, the testator, was of sound and disposing mind, memory, and understanding and capable of making a valid deed or contract the said caveators, by their counsel, objected on the ground that by the terms of said order of the court fixing the position upon the record of the parties to this case, by which the caveatees were plaintiffs, the burden of

proof was upon them to establish, as a part of their case-in-chief, that the testator was of sound and disposing mind, memory, and understanding and capable of making a valid deed or contract, and that it is too late for them to introduce proof thereof in rebuttal or after the close of the caveators' testimony; but the court overruled the objection to the introduction of said testimony and permitted the said caveatees to offer the said foregoing evidence to show the testamentary capacity of said testator; to which ruling of the court overruling said objection of said caveators to the introduction of said evidence the caveators, by their counsel, then and there excepted and prayed the court to note upon its minutes their said exception, which is accordingly done before the jury retire, and pray the court to sign and seal this their bill of exceptions, which is accordingly done, as aforesaid.

Whereupon the caveatees, through their counsel, asked the court to instruct the jury that there was no evidence in the case tending to show fraud, undue influence, or coercion, and that on these issues the jury should render its verdict for the caveatees; which request was granted.

Whereupon the caveators, through their counsel, asked the following instructions, which were granted:

44 *Caveators' Prayers.*

1. Unless the jury believe that at the time of the execution of the paper-writing purporting to be his last will Charles Wesley Hauptman, the testator, fully understood the nature of the business in which he was engaged and had sufficient capacity to make a disposition of his estate with judgment and understanding in reference to the amount and situation of his property and the relative claims of different persons who were or should have been the objects of his bounty, and understood the manner in which he disposed of it, then he had not sufficient mental capacity to make a valid last will, and the verdict must be for the caveators on the third and fourth issues as to the alleged will.

(Granted.)

2. The provisions of said paper-writing may be considered by the jury in deciding the question of the mental capacity of the testator to make a valid last will or codicil, and if the jury should believe that the said paper in its provisions is unjust or injudicious, that is a fact to be considered with the rest of the evidence, but it is not of itself sufficient ground for finding that the testator had not sufficient capacity to make a valid will or codicil.

(Granted.)

3. The court instructs the jury that the burden of proof is on the caveatees to establish by a fair preponderance of all the evidence in this case that at the time of the alleged execution of the paper-writing purporting to be his last will and testament the said Charles Wesley Hauptman was of sound and disposing mind, memory, and understanding and capable of making a valid deed or contract.

(Granted.)

All of which exceptions, as stated in the foregoing bill of exceptions, were duly entered by the court upon its minutes, and the said several exceptions are signed and sealed as the exceptions which were taken at the trial of this cause, on this 7th day of November, 1900, *nunc pro tunc*.

CHAS. C. COLE, *J.* [SEAL.]

Form 43.

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

[Ten-cent U. S. internal-revenue stamp, canceled Nov. 12, 1900. L. A. D.]

DISTRICT OF COLUMBIA, *To wit:*

I, Louis A. Dent, register of wills for the District of Columbia and *ex officio* clerk of the said special term for orphans' court business, do hereby certify the foregoing pages, numbered from 1 to 83, inclusive, to be a true copy of the originals of certain papers on file in the office of the register of wills in case No. 8916, Estate of
45 Charles W. Hauptman, deceased, the same constituting a full, true, and correct transcript of the record of proceedings had in said cause.

Seal Supreme Court of the District of Columbia, Probate Jurisdiction.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said supreme court, special term for orphans' court business, this 12th day of November, anno Domini 1900.

LOUIS A. DENT.

Endorsed on cover: District of Columbia supreme court. No. 1030. Helen C. Raub *et al.*, appellants, *vs.* Helen C. Carpenter *et al.* Court of Appeals, District of Columbia. Filed Nov. 13, 1900. Robert Willett, clerk.

46 WEDNESDAY, *January 16th, A. D.* 1901.

HELEN C. RAUB, CHARLES D. COLLINS, LEWIS E. Collins, *et al.*, Appellants,
vs.
HELEN C. CARPENTER, HELEN K. BREMERMAN, EDMUND H. Brown, *et al.* } No. 1030.

The argument in the above-entitled cause was commenced by Mr. Clayton E. Emig, attorney for the appellants, and was continued by Mr. Joseph A. Burkart, attorney for the appellees.

THURSDAY, *January 17th, A. D.* 1901.

HELEN C. RAUB, CHARLES D. COLLINS, LEWIS E. Collins, *et al.*, Appellants,
vs.
HELEN C. CARPENTER, HELEN K. BREMERMAN, EDMUND H. BROWN, *et al.* } No. 1030.

The argument in the above-entitled cause was continued by Mr. J. J. Darlington, attorney for the appellees, and was concluded by Mr. Charles Poe, attorney for the appellants.

47 HELEN C. RAUB, CHARLES D. COLLINS, LEWIS E. Collins, *et al.*, Appellants,
vs.
HELEN C. CARPENTER, HELEN K. BREMERMAN, EDMUND H. BROWN, *et al.* } No. 1030.

Opinion.

Mr. Justice MORRIS delivered the opinion of the court:

There are here two appeals from the supreme court of the District of Columbia holding a special term for orphans' court business in the matter of the admission of the will of one Charles W. Hauptman to probate.

Charles W. Hauptman, a resident of the city of Washington, died here on May 2, 1899, leaving an estate of upwards of fifty thousand dollars, and as his heirs-at-law and next of kin one sister, the appellee Helen C. Carpenter, and a large number of nieces and nephews, the children of deceased brothers and sisters. He also left an instrument of writing purporting to be his last will and testament, whereby he devised and bequeathed a life estate in his property to a sister, who subsequently died before him, and thereafter a specific sum of money to the appellee Helen C. Carpenter, some pecuniary bequests to charitable organizations, and the residue to be divided equally between his nephews and nieces other than the appellants in this case. Thereafter there was a codicil added to the will whereby he bequeathed an additional sum of money to Helen C. Carpenter.

A caveat to both will and codicil was filed by the present appellants, who were among the heirs-at-law and next of kin of the testator; and thereupon issues were framed for trial by jury. These issues were four in number, and the same issues were addressed severally both to the will and to the codicil. They raised the question: (1) Whether there was fraud, circumvention or undue influence exercised upon the testator; (2) whether there was fraud or coercion exercised upon him; (3) whether he was of sound and disposing mind and capable of executing a valid deed or contract; (4) whether the writings in question were the last will and testament and the codicil of the deceased. An order was made by the court that, upon the trial of these issues, the caveatees should hold the position of plaintiffs and the caveators that of defendants; and further that the trial should be had by the jury then summoned and in attendance

on criminal term No. 2 of the court, which was stated in the order to be "a jury of good and lawful men," of whom the names were therein given.

The trial was accordingly had before said jury. In the course of it there were several exceptions reserved to the rulings of the court in the matter of the admission or exclusion of testimony. On the conclusion of the testimony an instruction was asked on behalf of the caveatees to the effect that there was no evidence in the case tending to show fraud, undue influence, or coercion, and that on these issues the verdict of the jury should be for the caveatees; and this instruction was given without objection from the caveators or exception taken by them. Three instructions were requested on behalf of the caveators all addressed to the question of the mental capacity of the testator to execute a valid will or testament, and all of which were granted.

The jury upon all the issues returned a verdict in favor of the caveatees, thereby sustaining the validity of both will and codicil. Thereupon the probate court entered an order admitting the will and codicil to probate and for the granting of letters testamentary thereon. From this order the caveators appealed.

Subsequently the caveators moved to vacate this order, on the ground that one of the jurymen was doubly disqualified for service on the jury by the fact that he was under the age of 21 years,
48 and the further fact that he had been several times convicted of the crime of petty larceny in the police court of the District. And this motion was supported by affidavits and by transcripts from the records of the police court. These affidavits showed among other things, that, at the beginning of the trial term of the court to which they had been summoned, the jurors had all been examined on their *voir dire* by the presiding justice as to their qualification to serve on the jury; that the juror, now charged to be disqualified, had then and there falsely answered that he was over the age of 21 years and had never been convicted of crime; that one of the counsel for the caveators was present in court at the time of such examination; and that the falsehood of the statements of the juror in question was not known to the caveators or their counsel until after the entry of the order now sought to be vacated.

The court denied the motion to vacate the order, coupling with the denial the statement that "at the trial there was no evidence of mental incompetency, fraud, or undue influence." From this refusal to vacate the order previously made the caveators appealed.

The caveators have here assigned six assignments of error, which are as follows:

(1.) The court erred in refusing to permit conversation with Helen C. Carpenter, to be introduced in evidence.

(2.) In refusing to permit the witness George A. Heinecke to give his opinion as to the mental capacity of the deceased.

(3.) In refusing to permit the witness Dr. R. S. Lamb, to testify as an expert.

(4.) In permitting the appellees to reopen their case and to offer evidence in rebuttal.

(5.) In passing the order of June 26, 1900, admitting said paper-writings to probate and granting letters testamentary thereon.

(6.) In overruling the motion to vacate said order admitting said papers to probate and granting letters testamentary thereon.

These assignments will be considered in the order in which they have been stated by the appellants.

1. As to the first assignment based upon the alleged refusal of the trial court to admit in evidence certain conversations had by one of the witnesses, Mary S. Heinecke, with Helen C. Carpenter, one of the appellees, it is difficult to see why the briefs here should have been incumbered with it. It is true that, when the question was first asked in regard to these conversations, the proposed testimony was excluded; but immediately thereafter, upon the repetition of the question, the testimony was admitted. There was, therefore, no error of which the appellants can here reasonably complain; and we understand counsel for the appellants to abandon this assignment in the oral argument had before us. It is certainly untenable.

2. It is complained in the second assignment of error that Dr. George B. Heinecke, one of the caveatees, a practising physician in the city of Washington and a grand-nephew of the deceased, who was called as a witness on behalf of the caveators, was not permitted to give his opinion as to the mental capacity of the deceased. This witness had testified that he had known the testator all his life; that on one occasion he had seen the testator laughing to himself; that on or about the 13th of February, 1899, during the blizzard, the testator acted peculiarly about the snow in his yard—did not know how it got in there, and went out there and tried to get it removed; and that he was present at the autopsy had of his grand-uncle's brain the day after his death. He was then asked this question: "Doctor, have you formed any opinion from your uncle's general condition of health and the conditions disclosed by his brain at this investigation, *and from all that you know about him yourself*, what his condition of mind was?" Objection was made on behalf of the caveatees to that part of the question which solicited an opinion from the witness from all that he knew about the testator himself, on the ground that no basis had been laid for any such opinion inasmuch as no facts had been stated upon which to base an opinion; and the court sustained this objection, while the witness was permitted freely to answer the remainder of the question.

It is very clear to us that the objection was properly sustained. The question assumes that the witness knew sufficient facts concerning the testator on which to base an opinion that he was not of sane mind; and yet not a single fact is stated, and it appears even that there was a positive refusal on the part of the caveators to interrogate the witness as to any such facts. And yet he is asked to give an opinion upon which he cannot be cross-examined, and the value of which the jury would be wholly unable to estimate. The trivial circumstances about the blizzard and the testator's being seen to laugh to himself at one time, were long subsequent to the time of the execution both of the will and codicil; and even if they were in themselves worthy of serious consideration, it is diffi-

cult to see how they could throw any light on the mental condition of the testator in 1896, or even in 1898. The jury was entitled to have the facts on which the witness based his opinion, and they were refused. It would have been error to admit an expression of opinion by the witness under such circumstances. We think that the point was decided in the case of Taylor *v.* United States, 7 App. D. C. 27, 36. See, also, the case there cited of Insurance Company *v.* Lathrop, 111 U. S. 612.

3. Error is assigned in the third place on the refusal of the trial court to permit Dr. Robert S. Lamb, called as a witness for the caveators, to testify as an expert. The condition of things on which this assignment is based, as developed by the record, was this:

On the day following the testator's death an autopsy or *post-mortem* examination was made of his brain, at the instance of Dr. George N. Perry, the husband of one of his nieces, with a view of ascertaining the cause of some convulsions or epileptic fits which he had experienced on two several occasions, one about five months and the other about a year before his death. The examination was made by Dr. D. S. Lamb, in the presence of four or five other physicians, all of whom were called by the caveators as witnesses, and all of whom except one failed to find in the condition of the brain any evidence of mental unsoundness. Dr. D. S. Lamb him-
49 self, who made the autopsy, testified to the same effect; and the cause of death was pronounced to be anæmia of the brain, which is not a cause of mental unsoundness. One of the physicians, however, who were present, Dr. Robert S. Lamb, a son of the gentleman who made the autopsy, and who seems to have regarded himself as better qualified than the others to find evidence of mental unsoundness in the brain of the deceased man, testified that in his opinion the brain was in an unhealthy condition and that the disease of the testator had been progressing for eight or ten years before his death. He further testified that he had been practicing medicine for nine months; that while he was studying in the hospitals he had seen possibly about two hundred and fifty cases of brain surgery, none of which related to diseases of the brain; that he had seen no operations to determine the mental capacity of a man having a brain such as that disclosed by the examination in this case; and that there was nothing about such as he had seen which would throw any light upon the question of the testator's mental condition. Thereupon he was asked, "whether, in his opinion as an expert physician, from the appearance and general condition of the brain of the testator, it was possible to form a judgment as to the mental capacity of the testator on the 30th day of November, 1896, and also on the 15th day of April, 1898 (the days of the execution of the will and codicil respectively); and if so, what that opinion was."

This question was objected to by the caveatees and excluded by the court on the ground that the witness had not been shown to be an expert on the subject-matter on which his opinion was asked. And it is this ruling which forms the basis of the third assignment of error.

It is wholly unnecessary to discuss this point. The witness was so clearly incompetent to testify as an expert that it would be a waste of time to consider the question at any length. Moreover, we have held in the case of Lansburgh *v.* Wimsatt, 7 App. D. C. , that, when a witness is called as an expert, the question of his competency or of his possession of the requisite qualifications is a preliminary one for the trial court, whose decision thereon is conclusive, unless it is clearly shown to have been founded in error of law or fact. So far from there having been error here, it would have been patent and palpable error on the part of the trial court to have held this witness qualified to testify as an expert.

4. The fourth assignment of error is that the appellees were permitted by the trial court to reopen the case and to offer testimony in rebuttal.

This assignment is scarcely sustained by the record before us. But the complaint seems to be that, inasmuch as by the order of the probate court the caveatees were made plaintiffs and the caveators defendants, it was incumbent on the former in their testimony-in-chief not only to show the execution of the alleged will and codicil by the attesting witnesses, but also to go fully into their case and to show that at the dates of their execution the testator was capable of executing a valid deed or contract; and it is intimated that this was not done. The point is assumed to have been reserved by an objection which, on the record, would appear to have been made at the conclusion of the whole testimony to all the testimony introduced on behalf of the caveatees to show that the testator was of sound and disposing mind, but which in argument is stated to have been duly interposed according as the testimony was offered.

The bill of exceptions is manifestly incomplete, inasmuch as it fails to show the order in which the testimony was adduced. It is wholly silent as to what testimony was offered in chief by the caveatees. In fact, it does not show that they offered any testimony whatever in chief. The record would rather indicate that at the opening of the trial the caveators had usurped the place of the caveatees as plaintiffs; and the testimony, which appears in the record for the caveatees, does not purport to be testimony in rebuttal. But if the caveatees did in fact open the case as plaintiffs, and if the testimony on their behalf which appears in this record was only their testimony in rebuttal, it is very plain that much of it is strictly in rebuttal of the testimony of the caveators, as, for example, the expert testimony of the physicians. A general objection, therefore, to all of it in bulk will not avail. For the very reason that they were entitled to open the case as plaintiffs, they were entitled to take testimony in rebuttal; every plaintiff is so entitled. And the objection of the caveators, if they had objection, should not have been to the introduction of testimony in rebuttal, but to the introduction of such testimony in rebuttal as should have been offered in chief; and this should have been pointed out and specific objection made to it.

But it is well settled that this matter of the order of proof is within the discretion of the trial court, and that such discretion is not a subject of review by an appellate court, unless for abuse of it, which

certainly is not here shown. It is not apparent that the caveators have been deprived of any right by the order which was followed in this case. Rich *v.* Lemmon, 15 App. D. C. 507; Overby *v.* Gordon, 13 App. D. C. 406.

Moreover, the practice which seems to have been followed here was the usual and proper practice. Rich *v.* Lemmon, 15 App. D. C. 507; Brown *v.* Ward, 53 Md. 392.

5. The fifth assignment of error requires no consideration from us. It is merely a general allegation that the court below erred in admitting the paper-writings in question to probate and granting letters testamentary thereon. If any of the previous specifications of error had been well founded, this consequence might follow. But as we hold that they are not well founded and we find no other error in the record in this connection, this fifth assignment cannot be regarded as of any force.

This disposes of all the assignments of error alleged in connection with the first appeal taken by the caveators, that from the order of the court below admitting the will and codicil to probate.

6. There remains, however, the sixth assignment based on the refusal of the court below to vacate that order or decree; and this raises the question of the effect of the disqualification of a juror upon the proceedings, when such disqualification has not been discovered until after verdict and judgment thereon.

Section 872 of the Revised Statutes of the United States for the District of Columbia, in part merely affirming the rule of the common law, provides that—

"No person shall be competent to sit as a juror unless he be a citizen of the United States, a resident of the District of Columbia, over twenty-one and under sixty-five years of age, and a good and lawful man, who has never been convicted of a felony or misdemeanor involving moral turpitude."

As already stated, one of the jurors who sat in this case is alleged to have been under twenty-one years of age and to have been repeatedly convicted of petty larceny in the police court of the District of Columbia; and substantial proof was adduced of the allegation, which is not sought to be controverted by the appellees. Undoubtedly, unless this testimony can be successfully controverted, and there seems to be no good reason to suppose that it can be, the juror in question was wholly disqualified to act as a juror. It is strange that the Commissioners, who are charged by law with the preparation of the jury-list, should have permitted the name of such a man to be entered on their list; and it is still more strange that no steps seem to have been taken by any one to have him prosecuted for perjury. The crime of perjury is too frequently committed in judicial proceedings; and it behooves those who have been injured by such perjury to call the attention of the courts and of the prosecuting officers of the Government to the cases wherein it has been committed. The fountains of justice should not be allowed to be polluted with impunity by such crimes committed in the course of its administration.

But while the jury in this case may have been tainted by the

presence on its panel of one repeatedly convicted of petty larceny and shown to have been guilty of perjury, it does not necessarily follow that the caveators were entitled to have their motion allowed. That was a matter within the sound discretion of the trial court. The parties were entitled under the law to have a jury of good and lawful men, possessed of all the qualifications prescribed by the law, for the trial of the issues between them; but it is the duty of parties themselves to aid in the selection of a competent jury. For that purpose the lists are published in advance, ample time is given for investigation, opportunity is afforded for the examination of the jurors as to their fitness to act as such, and a right to challenge for cause is permitted to the most liberal extent. At the opening of the cause and before the jury is empaneled and sworn, is the proper time for the examination of the qualification of jurors, and not afterwards. If no effort has been made at that time to determine such qualifications, it is not ordinarily in the interest of justice that the investigation should be allowed to be made after the trial has been had, the verdict rendered, and the jury discharged.

It is true that here there had been a preliminary examination by the court at the beginning of the term, and that the juror now impeached as a convict had falsely stated that he was qualified, thereby lulling the caveators and others into a false sense of security. But the records of the police court would have shown the falsity of the juror's statement, and they were open to the public inspection. That the caveators did not know the fact which they evidenced was their misfortune; it would seem that they would be chargeable in law, under the circumstances of this case, with knowledge of them.

It is a potent consideration, however, that the irregularity in the constitution of the jury is not shown to have been detrimental to the interest of the caveators; for it is well-settled law in this jurisdiction, under repeated adjudications by the Supreme Court of the United States, that even a plain and palpable error will not suffice to cause the reversal of a judgment, if the party against whom the judgment is rendered has not been prejudiced thereby. Lancaster *v.* Collins, 115 U. S. 222; Hughes *v.* Heyman, 4 App. D. C. 444; Posey *v.* Hanson, 10 App. D. C. 496.

It is not apparent in the present instance that there has been any prejudice to the rights of the appellants by the introduction of a disqualified juror into the jury-box. Most, if not all, of the cases cited, in which verdicts and judgments have been set aside on the ground of such disqualification, have been cases in which jurors have been interested in the result of the suit, and where therefore the law raised the insuperable presumption of the absence of impartiality. But there is no pretense in this case that the objectionable juror was not impartial. Moreover, the record purports to contain all the testimony adduced in the case. It is conceded that this testimony contains not a scintilla of evidence in support of the charges of fraud, undue influence, circumvention, or coercion made by the caveators; and it is perfectly clear to us, as it was to the trial court, while not conceded by the appellants, that the charge of mental unsoundness is wholly unsustained and without any support

whatever in the testimony. It is intimated in the order appealed from that the trial court would have peremptorily directed a verdict on this issue as well as on the others, if it had been requested so to do; and we think that it would have been fully justified in such direction. Looking, therefore, to the substantial ends of justice, and not merely to form and technicality, we are unable to see how the caveators have been prejudiced, or how a new trial, with an unimpeachable jury, would subserve their purpose further than as it would harass the caveatees, who may well be presumed to have been equally ignorant of the disqualification of the juror mentioned.

But the principal ground on which the sixth assignment of error must be regarded as untenable, is that the order appealed from is not an appealable order. In accordance with the well-established rule of the common law and with the general rule prevailing everywhere unless changed by statute, we have held in several cases that the rulings of a trial court on motions for a new trial, applications for a rehearing in equity, and motions to vacate orders, judg-
51 ments, or decrees, are within the sound discretion of the court to which the motions are addressed, and are not in general subject to review by an appellate court. District of Columbia *v.* Wilcox, 4 D. C. 90; Thomas *v.* Presbrey, 5 App. D. C. 217; D. C. *v.* Cemetery, 5 App. D. C. 497; Brown *v.* Bradley, 6 App. D. C. 207; Chester *v.* Morgan, 11 App. D. C. 435; St. Clair *v.* Conlon, 12 App. D. C. 161; Babbington *v.* Brewery Co., 13 App. D. C. 527;

The motion to vacate the order which had been entered in this case was not different in its tenor and effect from a motion for a new trial. We think the discretion of the trial court was wisely exercised in denying it. See, also, Johns *v.* Hodges, 60 Md. 215; and Roseborough *v.* State, 43 Tex. 574.

Being of the opinion that there is no error disclosed by the record, we must conclude that the orders appealed from must be affirmed, with costs.

And it is so ordered.

52 TUESDAY, *February 5th, A. D.* 1901.

HELEN C. RAUB, CHARLES D. COLLINS, LEWIS E. COLLINS, *et al.*, Appellants,
vs.
HELEN C. CARPENTER, HELEN K. BREMERMAN, Edmund H. Brown, *et al.*
} No. 1030, January Term, 1901.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the orders of the said supreme court, in this cause be, and the same are hereby, affirmed with costs.

Per MR. JUSTICE MORRIS.

February 5, 1901.

53 WEDNESDAY, *February 13th, A. D.* 1901.

HELEN C. RAUB, CHARLES D. COLLINS, LEWIS E. COLLINS, *et al.*, Appellants,
vs.
HELEN C. CARPENTER, HELEN K. BREMERMAN, EDMUND H. BROWN, *et al.*
No. 1030.

On motion of Mr. Charles Poe, attorney for the appellants in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States, be and the same is hereby allowed, and the amount of the bond to act as a supersedeas is fixed at $25000, and the bond for costs is fixed at $300.

54 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Helen C. Raub, Charles D. Collins, Lewis E. Collins, Martha E. Collins, Margaret A. Worster, William F. Hauptman, Georgiana Hutchins, Charles S. Douglass, Harry Hauptman, Maria Louisa Donaldson, Harriet E. Ege, & Annie Beck, appellants, and Helen C. Carpenter, Helen K. Breme-man, Edmund H. Brown, Mary E. Perry, William F. Brown, Lloyd Douglas, Caroline Watson, John D. Hauptman, Clinton C. Hauptman, Mary B. Tracy, Clara B. Hurley, William C. Hauptman, Mary M. King, David Lomax, William E. Edmonston, Mary S. Heinecke, Washington City Orphan Asylum, by J. J. Darlington, president; Washington City Bible Society, by A. W. Petzer, president; Methodist Home D. C. by A. B. Duvall, president; The American University, John F. Hurst, chancellor; O. B. Brown, chairman b'd of directors Central Union Mission, Lucy Webb Hayes Nat'l Training School and Sibley Hospital, Alfred C. Ames, pres'd't; American Bible Society, by Wm. Ferelke; Missionary Society of the Methodist Episcopal Church, by Homer Eaton, treasurer; W. A. Spencer, cor. sec't'ry board church extension Methodist Episcopal church; Board of Trustees of Foundry M. E. Church, by Addison M. Smyth, president, a manifest error hath happened, to the great damage of the said appellants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same

in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done
55 therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of February, in the year of our Lord one thousand nine hundred and one.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

56 Know all men by these presents, that we, Charles D. Collins, Lewis E. Collins, Martha E. Collins, Margaret A. Worster, William T. Hauptman, Georgiana Hutchins, Charles S. Douglass, Harry Hauptman, Maria Louisa Donaldson, Harriet E. Ege, Annie Beek and Helen C. Raub, as principals, and W. Riley Deeble, as surety, are held and firmly bound unto Helen C. Carpenter, Helen K. Bremerman, Edmund H. Brown, Mary E. Perry, William F. Brown, Lloyd Douglas, Caroline Watson, John D. Hauptman, Clinton C. Hauptman, Mary B. Tracy, Clara B. Hurley, William C. Hauptman, Mary M. King, David Lomax, William E. Edmonston, executor of the last will and testament of Charles W. Hauptman, deceased, Mary S. Heinecke, Washington City Orphan Asylum, Washington City Bible Society, Methodist Home D. C., The American University, Central Union Mission, Lucy Webb Hayes National Training School and Sibley Hospital, American Bible Society, Missionary Society of the Methodist Episcopal Church, Board Church Extension Methodist Episcopal Church, Board of Trustees of Foundry M. E. Church, in the full sum of three hundred dollars to be paid to the said Helen C. Carpenter, Helen K. Bremerman, Edmund H. Brown, Mary E. Perry, William F. Brown, Lloyd Douglas, Caroline Watson, John D. Hauptman, Clinton C. Hauptman, Mary B. Tracy, Clara B. Hurley, William C. Hauptman, Mary M. King, David Lomax, William E. Edmonston, executor of the last will and testament of Charles W. Hauptman, deceased, Mary S. Heinecke, Washington City Orphan Asylum, Washington City Bible Society, Methodist Home D. C., The American University, Central Union Mission, Lucy Webb Hayes Training School and Sibley Hospital, American Bible Society, Missionary Society of the Methodist Episcopal Church, Board Church Extension Methodist Episcopal Church, Board of Trustees of Foundry M. E. Church, their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirteenth day of March in the year of our Lord nineteen hundred and one.

57 Whereas, lately at the Court of Appeals of the District of Columbia, in a suit depending in said court, between said Charles D. Collins, Lewis E. Collins, Martha E. Collins, Margaret A. Worster, William F. Hauptman, Georgiana Hutchins, Charles S. Douglass, Harry Hauptman, Maria Louisa Donaldson, Harriet E. Ege, Annie Beek and Helen C. Raub, as caveators, and said Helen C. Carpenter, Helen K. Bremerman, Edmund H. Brown, Mary E. Perry, William F. Brown, Lloyd Douglas, Caroline Watson, John D. Hauptman, Clinton C. Hauptman, Mary B. Tracy, Clara B. Hurley, William C. Hauptman, Mary M. King, David Lomax, William E. Edmonston, executor of the last will and testament of Charles W. Hauptman, deceased, Mary S. Heinecke, Washington City Orphan Asylum, Washington City Bible Society, Methodist Home D. C., The American University, Central Union Mission, Lucy Webb Hayes Training School and Sibley Hospital, American Bible Society, Missionary Society of the Methodist Episcopal Church, Board Church Extension Methodist Church, Board of Trustees of Foundry M. E. Church, as caveatees, a judgment was rendered against the said Charles D. Collins, Lewis E. Collins, Martha E. Collins, Margaret A. Worster, William F. Hauptman, Georgiana Hutchins, Charles S. Douglass, Harry Hauptman, Maria Louisa Donaldson, Harriet E. Ege, Annie Beek and Helen C. Raub, and the said Charles D. Collins, Lewis E. Collins, Martha E. Collins, Margaret A. Worster, William F. Hauptman, Georgiana Hutchins, Charles S. Douglass, Harry Hauptman, Maria Louisa Donaldson, Harriet E. Ege, Annie Beek and Helen C. Raub having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Helen C. Carpenter, Helen K. Bremerman, Edmund H. Brown, Mary E. Perry, William F. Brown, Lloyd Douglas, Caroline Watson, John D. Hauptman, Clinton C. Hauptman, Mary B. Tracy, Clara B. Hurley, William C. Hauptman, Mary M. King, David Lomax, William E. Edmonston, executor of the last will and testament of Charles W. Hauptman, deceased, Mary S. Heinecke, Washington City
58 Orphan Asylum, Washington City Bible Society, Methodist Home D. C., The American University, Central Union Mission, Lucy Webb Hayes Training School and Sibley Hospital, American Bible Society, Missionary Society of the Methodist Episcopal Church, Board Church Extension Methodist Episcopal Church, Board of Trustees of Foundry M. E. Church, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date hereof.

Now, the condition of the above obligation is such, that if the said Charles D. Collins, Lewis E. Collins, Martha E. Collins, Margaret A. Worster, William F. Hauptman, Georgiana Hutchins, Charles S. Douglass, Harry Hauptman, Mary Louisa Donaldson, Harriet E. Ege, Annie Beek and Helen C. Raub shall prosecute said writ of error to effect, and answer all costs if they fail to make their plea

good, then the above obligation to be void; else to remain in full force and virtue.

HELEN C. RAUB. [SEAL.]
CHARLES D. COLLINS. [SEAL.]
MARGARET A. WORSTER. [SEAL.]
MARTHA E. COLLINS. [SEAL.]
LEWIS E. COLLINS. [SEAL.]
WILLIAM T. HAUPTMAN. [SEAL.]
ANNIE BEEK. [SEAL.]
CHAS. S. DOUGLASS. [SEAL.]
HARRY HAUPTMAN. [SEAL.]
MARIA L. DONALDSON. [SEAL.]
HARRIET E. EGE. [SEAL.]
GEORGANNA HUTCHINS.
W. RILEY DEEBLE. [SEAL.]

Sealed and delivered in the presence of:
CHAS. POE.

Approved by—
R. H. ALVEY, *Ch. Justice.*

March 13, 1901.

(Endorsed:) No. 1030. Helen C. Raub, Charles D. Collins, Lewis E. Collins, *et al. vs.* Helen C. Carpenter, Helen K. Bremerman, Edmund H. Brown, *et al.*. Bond for costs on writ of error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Mar. 13, 1901. Robert Willett, clerk.

59 UNITED STATES OF AMERICA, *ss:*

To Helen C. Carpenter, Helen K. Breme-man, Edmund H. Brown, Mary E. Perry, William F. Brown, Lloyd Douglas, Caroline Watson, John D. Hauptman, Clinton C. Hauptman, Mary B. Tracy, Clara B. Hurley, William C. Hauptman, Mary M. King, David Lomax, William E. Edmonston, Mary S. Heinecke, Washington City Orphan Asylum, by J. J. Darlington, president; Washington City Bible Society, by A. W. Petzer, president; Methodist Home D. C., by A. B. Duvall, president; The American University, John F. Hurst, chancellor; O. B. Brown, chairman b'd of directors Central Union Mission; Lucy Webb Hayes, Nat'l Training School and Sibley Hospital, Alfred C. Ames, pres'd't; American Bible Society, by Wm. Ferelke; Missionary Society of the Methodist Episcopal Church, by Homer Eaton, treasurer; W. A. Spencer, cor. sec't'ry board church extension Methodist Episcopal church; Board of Trustees of Foundry M. E. Church, by Addison M. Smyth, president, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein

Helen C. Raub, Charles D. Collins, Lewis E. Collins, Martha E. Collins, Margaret A. Worster, William F. Hauptman, Georgiana Hutchins, Charles S. Douglass, Harry Hauptman, Maria Louisa Donaldson, Harriet E. Ege, and Annie Beek are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 13th day of March, in the year of our Lord one thousand nine hundred and one.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted.
J. J. DARLINGTON,
Att'y for Caveatees, Defendants in Error.

March 14, 1901.

[Endorsed:] Court of Appeals, District of Columbia. Filed Mar. 14 1901 Robert Willett clerk.

60 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 59 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Helen C. Raub, Charles D. Collins, Lewis E. Collins, *et al.*, appellants *vs.* Helen C. Carpenter, Helen K. Bremerman, Edmund H. Brown, *et al.*, No. 1030, January term, 1901, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 16th day of March A. D. 1901.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,086. District of Columbia Court of Appeals. Term No. 64. Helen C. Raub, Charles D. Collins, Lewis E. Collins, *et al.*, plaintiffs in error, *vs.* Helen C. Carpenter, Helen K. Bremmerman, Edmund H. Brown, *et al.* Filed March 21st, 1901.

FILED
OCT 9 1902
JAMES H. McKENNEY,
Clerk.

No. 64.
Brf. of Poe for P. C.

Filed Oct. 9, 1902.

Supreme Court of the United States,

OCTOBER TERM, 1902.

No. 64.

HELEN C. RAUB ET AL.

vs.

HELEN C. CARPENTER ET AL.

In Error to the Court of Appeals of the District of Columbia.

BRIEF FOR THE PLAINTIFFS IN ERROR.

CHARLES POE,
VICTOR H. WALLACE,
For Plaintiffs in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1902.

No. 64.

HELEN C. RAUB ET AL.

vs.

HELEN C. CARPENTER ET AL.

In Error to the Court of Appeals of the District of Columbia.

BRIEF FOR THE PLAINTIFFS IN ERROR.

I.

Statement of the Case.

This is a writ of error to the Court of Appeals of the District of Columbia to have its order affirming certain orders of the Supreme Court of the District of Columbia holding a Special Term for Orphans' Court business, reviewed and reversed. (Record, 52, 53.) On the second of May, 1899, one Charles W. Hauptman died in Washington leaving an estate both real and personal, amounting to upwards of fifty thousand dollars. He left one sister surviving him,

Helen C. Carpenter, and a large number of nieces and nephews, the children of deceased brothers and sisters. He left a paper which was published as his last will on November 30, 1896, and a codicil thereto bearing date April 15, 1898. (Record, 21, 26.)

By the terms of the first of these papers, after a life estate in all his estate to a sister, Mary E. Hauptman, (who afterwards died during the life of the testator), he devised and bequeathed his estate substantially as follows: Six thousand dollars to Helen C. Carpenter, certain pecuniary legacies to various Methodist charitable organizations, and the residue, share and share alike, among his nieces and nephews, other than the plaintiffs in error, whom he disinherited. He appointed William E. Edmonston executor. The codicil merely bequeathed the further sum of ten thousand dollars to Helen C. Carpenter.

In December, 1899, the plaintiffs in error, who are heirs at law and distributees of Charles W. Haupman, the deceased, filed a caveat against said will and codicil, (Record, page 1), alleging want of testamentary capacity, fraud, and undue influence. And after answers filed (Record, pages 2, 5) issues were framed to be tried by a jury as to both the alleged will and codicil. (Record, page 5.)

The order framing these issues was dated March 19, 1900, and counsel agreed to try them on June 13 of that year. In accordance with the custom which then obtained, all issues of fact from the Supreme Court of the District of Columbia holding a Special Term for Orphans' Court business, were tried in Criminal Court No. 2 and by the jury selected for service in that Court. The juries to serve in all the Courts of

the District which have juries are selected on the first Tuesday of each month to serve for that month, and on that day are examined upon their oaths as to their qualifications to serve as jurors. In this particular instance the jurors for the month of June were so examined in open Court and in the presence of one of the counsel for the plaintiffs in error (Record, page 13) and, as is not disputed, one of the jurors so accepted swore falsely as to his age, and also as to whether he had ever been convicted of a felony or of a crime involving moral turpitude. On June 13, 1900, the case was called for trial, and a panel containing the name of this juror was handed to each side so that each side might strike four, leaving the remaining twelve to try the issues. It is not contended that either side knew that this juror had sworn falsely nor that he did not swear falsely nor that the fact of his having so sworn was discovered until after verdict.

At the beginning of the trial an order was passed by the Court making the caveators plaintiffs and the caveateees defendants, and "that the said issues be tried by the jury summoned for and now in attendance upon Criminal Court No. 2 of this Court, a jury of good and lawful men of the District of Columbia." (Record, page 7.) At the trial several exceptions were reserved to rulings of the Court upon questions of evidence, which are set out in the bill of exceptions. The Court instructed the jury at the request of the caveatees that there was no evidence of fraud or undue influence, but the question of testamentary capacity was left to them and they found in favor of the caveatees, the verdict being signed and returned on June 15. On June 26, 1900, an order

was passed admitting the will and codicil to probate and granting letters testamentary, which order recites that it is passed because of the proceedings before said jury. (Record, page 9.) On July 16, 1900, and during the same term of Court at which the verdict was rendered, and the order of Court based thereon was passed, the plaintiff in error moved to have said verdict and order set aside, said motion being under oath and accompanied with affidavits and records setting forth the incompetency and disqualification of the juror, Lewis, the facts surrounding his selection to serve, the diligence of the attorney representing the plaintiff in error, and the ignorance of the parties as to the falsity of the oath made by said juror by means of which he became a member of the panel. (Record, pages 9-14.) There is no dispute as to the truth of the allegations of this motion nor of the affidavits. After argument, the Court denied this motion. (Record, page 14.) The plaintiffs in error appealed from the order admitting the papers to probate and also from the order refusing to vacate said order and prosecuted their appeal to the Court of Appeals of the District of Columbia, where the action of the lower Court was affirmed, (Record, page 52), and it is from this order of said Court of Appeals and to review and reverse the same, that this writ of error is sued out.

II.

Assignment of Errors.

The Court below erred :

1. In affirming the order of the Supreme Court of the District of Columbia admitting the papers to probate and granting letters testamentary thereon.

2. In affirming the order of the Supreme Court of the District of Columbia denying the motion to vacate its order admitting said papers to probate and granting letters testamentary thereon.

3. In refusing to permit the witness, George A. Heinecke, to give his opinion as to the mental capacity of the deceased. (Record, page 18.)

III.

Argument.

The main question involved in this case is that which concerns the validity and binding effect of what the defendants in error claim to have been a verdict. As has been stated, it is conceded that one of the jurors in the cause was a convicted felon and a perjurer. The question may be thus divided: First, is such a person competent in law, his disqualifications being unknown and actually concealed at the time of his acceptance as a juror? Second, what is the effect of his disqualification upon the alleged verdict? Third, what is the extent of the diligence required of parties to ascertain the competency or qualifications of jurors presented to them by a Court or other official as being persons competent and qualified?

First. Was this juror competent?

Section 872 of the Revised Statutes of the United States provides that—

"No person shall be competent to sit as a juror unless he be a citizen of the United States, a resident of the District of Columbia, over twenty-one and under sixty-five years of age, and a good and

lawful man, who has never been convicted of a felony or a misdemeanor involving moral turpitude."

It seems hardly worth while so discuss the question as to the disqualification of the juror, for no one seems seriously to deny that this is the effect of the statute.

He was disqualified at the time he took his seat in the box, and that is the point of time to which such an inquiry is to be directed.

Second. What was the effect of this disqualification upon the alleged verdict?

This leads us to draw a distinction between competency and qualification, and to direct the attention of the Court to the divisions existing at common law. (And not altered by statute.) *Propter defectum, propter affectum, propter delictum.*

5 Bacon's Abridgement, Juries (E).
1 Coke Inst. 156.
3 Blackstone, 364.
Presbury vs. Commonwealth, 9 Dana, 204.
State vs. Brockhaus, 72 Conn. 105.
Garrett vs. Wienburg, 54 S. Car. 128.

These divisions are inherent and still exist and are recognized, as the following authorities will demonstrate, as well as those above cited:

Kohl vs. Lehlback, 160 U. S. 293.
Herman vs. Bradshaw, 4 Bibb (Ky.) 45.
Shane vs. Clarke, 3 H. and McH. (Md.) 101.
Com. vs. Babcock, 1 Conn. 401.
Rex vs. Tiemearne, 5 B. & Cres. 254.
Sellers vs. The People, 4 Ill. 412.
Essex vs. McPherson, 64 Ill. 349.

Mylock vs. Saladine, 1 Wm. Black. 481.
Hardy vs. Sprowle, 32 Me. 310.
U. S. vs. Angney, 6 Mackey, 66.
Jeffries vs. Randall, 14 Mass. 205.
Wassum vs. Feeney, 121 Mass. 93.
Johns vs. Hodges, 60 Md. 215.
1 Thompson on Trials, sec. 116 *et seq.*
Averitt vs. State, 76 Md. 532.

The juror Lewis was a convicted felon. He got upon the panel through perjury and was not *homo bonus et legalis*. A perjurer cannot be a peer.

Third. What is the extent of the diligence required of parties to ascertain the competency of qualifications of Jurors presented to them by a Court or other officials as being persons competent and qualified?

The degree of diligence required of parties to ascertain the competency or qualifications of a juror should find its limit within the boundary of common sense. The jury commissioners are charged with the duty of placing the name of no person convicted of a crime, involving moral turpitude, upon the jury list. It is not to be presumed when a panel selected by them is offered to the parties as a jury for the trial of a particular case, that the jury commissioners have been lax in this duty, and that any one of these jurors is a convicted felon, and hence a person disqualified to serve by the express language of the statute, as well as at common law.

The jury commissioners first determine the statutory qualifications of the jurors, the Court then again examines them on this point for the sake of double security. Then, if there be disqualifications by interest, by relationship, or the like, it is the duty of the

parties to ascertain them by an examination of the jurors on their *voir dire*. But it is not necessary that the parties again travel over the same ground covered by both the jury commissioners and the Court, for it is not supposed that a juror will be more truthful in answering an examining counsel than he was in answering the Court itself. When the counsel for the caveators heard the juror Lewis state once under oath, in open Court, and in reply to a direct question by the presiding judge, that he was of lawful age and not disqualified by a conviction of crime, counsel had done all in the premises that the most rigid Court in the United States, or any other common law jurisdiction has ever required of parties or their attorneys; he had learned from the mouth of the juror himself, when under oath on an examination in open Court, that he was a qualified juror. It was not reasonable to require him to search further, for it must be remembered that it was not because Lewis had been convicted in a Court in the District of Columbia, that he was disqualified, but because he had been convicted of larceny, no matter where. A conviction in any State in the Union, or even in a foreign country, would have equally disqualified. Under a rule which would require a search into the past life of a juror in spite of his statements under oath, that search must extend to the criminal dockets of every jurisdiction in the United States and every foreign country having a recognized system of criminal laws—a thing which is manifestly impossible and consequently unreasonable.

Knights of Pythias vs. Steele, 63 S. W. 1126. (107 Tenn. 1.)
State vs. Groome, 10 Iowa, 308.
Hill vs. The People, 16 Mich. 351.

It will not do to say that no harm has been done, because the Court would have rendered the same verdict the eleven competent jurors and one incompetent one brought in, or even that if twelve competent jurors had brought in a different verdict the Court would have set it aside. The appellants had the constitutional right to a jury of good and lawful men—a common law jury.

Traction Co. vs. Hoff, 174 U. S. 1.
Briggs vs. Georgia, 15 Vt. 61.
Mann vs. Fairle, 44 Vt. 672.
Quinn vs. Halbert, 52 Vt. 353.
Ga. R. R. vs. Cole, 73 Ga. 713.
Knights of Pythias vs. Steele, 63 S. W. 1126. (107 Tenn. 14.)

If it be assumed (as is conceded in the opinion of the lower Court at page 50 of the Record), that Lewis was "wholly disqualified to act as a juror;" * * * "that the crime of perjury is too frequently committed in judicial proceedings;" * * * "the fountains of justice should not be allowed to be polluted with impunity by such crimes committed in the course of its administration;" * * * "the jury in this case may have been tainted by the presence on its panel of one repeatedly convicted of petty larceny and shown to have been guilty of perjury," does it not necessarily follow that the plaintiffs in error are entitled to a trial by a jury? Judge Morris says it does not, because it is a matter of discretion in the trial Court. We contend that we did everything reasonable to be expected of us to obtain a fair, honest, competent and qualified jury.

Knights of Pythias vs. Steele, 63 S. W. 1126 (107 Tenn. 1.)

Promptly and *within the term* the motion to vacate the order was made; its denial is a final judgment against us, its grant would have been but a trial of the issues by a forum insured to us by the Constitution.

Hof vs. Traction Co., 174 U. S. 1.

The refusal to grant a motion to strike out a judgment made within the term is subject to review on appeal.

Spalding vs Crawford, 3 App. D. C. 361.
Green vs. Hamilton, 16 Md. 317.
Hall vs. Holmes, 30 Md. 558.
2 Poe Pl. & Pr. Sec. 388 *et seq.*

2. As to the Third Assignment of Error.

George A. Heinecke was competent as a witness to express his opinion as to the sanity of the deceased, and the question of the value and weight of his testimony was for the jury. He was just as competent to express his opinion as to the lack of testamentary capacity as were the witnesses produced by the caveatees and permitted by the Court to give their opinion as to the alleged competency of the deceased. The law does not make a different rule for witnesses who testify as to *sanity* from the one applied to witnesses as to *insanity*. His testimony should have been permitted to go to the jury.

Ins. Co. vs. Lathrop, 111 U. S. 612 (619 especially.)
Taylor vs. U. S., 7 App. D. C. 27.

It is respectfully submitted that the order of the Court of Appeal of the District of Columbia, affirming the orders of the Supreme Court of the District of Columbia, should be reversed.

CHARLES POE,
VICTOR H. WALLACE,
For Plaintiffs in Error.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk

No. 64.

Sup. of Burkhart & Darlington

for D. C.

Filed Oct. 16, 1902.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No 64.

HELEN C. RAUB ET AL.

vs.

HELEN C. CARPENTER ET AL.

BRIEF FOR DEFENDANTS IN ERROR.

JOSEPH A. BURKHART,
J. J. DARLINGTON,
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OCTOBER TERM, 1902.

No. 64.

HELEN C. RAUB ET AL.

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BRIEF FOR DEFENDANTS IN ERROR.

Statement.

This cause is here upon two appeals, one from a decree of the Supreme Court of the District of Columbia of June 26, 1900, sitting as an orphans' court, admitting to probate and record the will and codicil of Charles W. Hauptman, and the other from an order of that court, of September 20, 1900, overruling appellants' motion to vacate the said decree because of the alleged incompetency of a juror at a trial of issues to determine its validity. Record, pp. 9–15.

The first of these appeals presents, simply, certain exceptions to the rulings of the trial court, at the trial before a jury of the issues set forth at pages 5 and 6 of the record,

framed under a caveat filed by the appellants to the probate and record of the two instruments, one bearing date the thirtieth day of November, 1896, purporting to be the last will and testament of Charles W. Hauptman, and the other dated April 15, 1898, purporting to be a codicil to the former instrument, both of which are set out at pages 21–25 of the record. The testator died on the 2d day of May, 1899, and the issues present the three questions of mental competency, fraud and undue influence, apart from the formal question whether the former instrument was the last will and testament of the decedent.

The testator, an older brother Francis Hauptman, and Mary E. Hauptman, their sister, all unmarried and somewhat advanced in life, had lived together for many years in the City of Washington. Francis Hauptman first died, leaving a will by which he gave his entire property to the two survivors, whereupon the present appellants employed counsel and instituted a contest to break the will, when, with considerable reluctance, and because of his age and of the strain of the litigation upon the health of his aged sister, the present testator, who was the executor under the will of Francis Hauptman, submitted to a compromise, quite rigorous in its terms, but which it has been deemed unnecessary to print in the record. Thereafter, upon the death of the sister leaving a will purporting to give her property to the present testator, the same parties, who are some of a large number of nephews and nieces, initiated a second contest, employing counsel for the like purpose, and desisting only upon learning that the sister and the present testator held as joint tenants, so that nothing could be gained by any result of the proposed contest. The record shows that the testator, who was a man of mild and amiable characteristics, and who had been a benefactor of the appellants and of their parents through a long series of years, was

much hurt by their conduct, and that he declared to a number of persons, including the caveators' own witness Mary S. Heinecke, that they should be left out of his will. Record pp. 17, 31, 33, 35, 36, etc. The will was prepared by William E. Edmonston, Esquire, at the instance of the testator and from written data furnished by the latter for the purpose, in his own handwriting, which data are set out at pages 30 and 31.

Brief and Argument.

The exceptions to the rulings of the court at the trial presented four questions, one of which related to the order of proof and three to the exclusion of certain testimony, these being the only questions covered by the first appeal, namely, that from the decree of the Orphans' Court, of June 26, 1900, admitting the will and codicil to probate and record. These four questions are set out and discussed, *seriatim*, in the opinion of the Court of Appeals, at pages 47–50. Only the second of them seems to be relied upon or referred to in the opposing brief in this court, and was as follows:

Dr. George B. Heinecke, a physician and a great-nephew of the testator, gave, in the first place, some testimony as to the testator's health, showing that he had suffered from urethral calculus, which ailment, however, he could not connect with any effect upon his brain, and that he had had attacks of epilepsy subsequently to the execution of the will and codicil. In the second place, he testified to two trivial circumstances in the testator's life, namely, that on one occasion he had seen him laughing to himself, and that, on the occasion of the great blizzard of 1899, he was surprised at the quantity of snow which had fallen in his yard and wished to have it removed; and, in the third place, he testified to the result of an autopsy after the testa-

tor's death, and to the cause of his death. Thereupon, he was asked the following question :

> " Doctor, have you formed any opinion from your uncle's general condition of health, and the conditions disclosed by his brain at this investigation, and *from all that you know about him yourself*, what his condition of mind was? "

The caveatees objected to that portion, only, of the question which called for the witness' opinion based upon " all that you know about him yourself," on the ground that no sufficient basis had been laid for that portion of the question, and that the facts relied upon in that particular should be first brought out. The counsel for the caveators declining to accede to this suggestion, or to develop the facts known to the witness about the testator upon which he was asked in part to base his opinion, the trial court sustained the objection, and, it is respectfully submitted, was unquestionably correct in so doing.

The condition of the testator's mind was one of the questions to be determined by the jury ; and while, concededly, it was competent for witnesses, whether medical experts or laymen, to state any facts known to them which would reflect light upon his mental capacity, and to follow this with an expression of their own opinions upon the subject, it was not competent to permit any witness to state an opinion based upon his alleged or assumed personal knowledge of facts concerning the testator, not only without disclosing, but refusing to disclose, the facts or knowledge upon which that opinion rested.

The remaining questions involved in the appeal from the decree of June 26th, being apparently abandoned in this Court, will not be discussed.

II.

The only remaining question in the cases is as to the propriety of the action of the Orphans' Court in over-ruling a motion to vacate its decree admitting the will and codicil to probate and record, with grant of letters testamentary to the executor, and to allow a new trial, because of the disqualification of one of the jurors who sat in the case.

Upon this question, the facts as shown by the record are as follows:

At the organization of the jury for the month of June, 1900, the trial justice propounded to the jurors the usual inquiry whether they were citizens of the United States, residents of the District of Columbia, over 21 and under 65 years of age, and whether they had ever been convicted of a felony or a misdemeanor involving moral turpitude, to which questions all the jurors responded that they were such citizens and residents, between the ages named, and that they had never been so convicted. At this first day of the jury term, the counsel for the caveators was present, and witnessed the proceedings just narrated. When the issues in this case came on for trial, June 13, 1900, the jurors were not put upon their *voir dire*, nor examined by either of the parties; but what is known as a long panel was struck—*i. e.*, the clerk drew by lot twenty names from among the jurors, each of the parties struck off four, and the remaining twelve were duly impanelled, among the twelve being one George G. Lewis.

On the 15th day of June, the jury found all the issues in favor of the will (Record, pp. 7–8); and, no motion for a new trial having been made, the Court on June 26, 1900, passed its decree admitting the will to probate and record and granting letters testamentary to the executor, from which decree the caveators noted an appeal. On the 16th

day of July, 1900, one month after the verdict and nearly three weeks after the decree, the caveators moved the court to vacate the latter and grant a new trial on the ground that the juror Lewis was under 21 years of age, and that he had been convicted of petty larceny on March 20, 1895.

On September 20th, this motion was presented to the Orphans' Court, and overruled, the order stating, among other things, that, in the opinion of the court, there was no evidence at the trial of mental incompetency, fraud or undue influence; and it is this second appeal, from the order of September 20, 1900, which presents the question mainly relied upon in this Court.

It is respectfully submitted that the contention of the plaintiffs in error is untenable, upon three distinct grounds, namely:

1. The motion for the new trial was made too late.

2. The objection to a juror because of his disqualification, comes too late after verdict.

3. The motion for a new trial, upon the ground stated, was a motion addressed to the discretion of the court, from which no appeal lies,—and which discretion, moreover, was rightly exercised.

1.

Rule 53 of the Supreme Court of the District of Columbia provides: "Every motion for a new trial must be made without four days, exclusive of Sundays, after verdict, and shall be in writing, and shall state, in separate paragraphs, successively numbered, the specific grounds upon which it is based, and it shall be entered on the minutes of the court on the day it is presented to the court. Judgment shall not be entered on the verdict until the fifth day thereafter, exclusive of Sundays; or if a motion in arrest of judgment or for a new trial shall be made, until after the ruling of the court on said motion."

Unless a motion for new trial is filed within four days after verdict, it cannot be considered (U. S. *v.* Angney, 6 Mackey, 66, 77).

In the case at bar, as stated, no motion for a new trial was filed within the four days, nor, indeed, until more than a month after the verdict had been rendered. On the 26th day of June, eleven days after the verdict, the orphan's court had accordingly rendered its final decree, admitting the will to probate and record, and granting letters testamentary to the executor. It was not until twenty days after this action of the court that the motion for a new trial was filed, nor was it presented to the court for action for upwards of sixty days after the last named date.

In the absence of a motion for a new trial seasonably filed, there is no provision for an application to the court for an allowance of a new trial, except under the Act of Maryland of 1787, Ch. 9, Sec. 6, to set aside a judgment for fraud, deceit, surprise or irregularity *in obtaining the same*. Spalding *v.* Crawford, 3 D. C. App., 361, 366–7. And this remedy is limited to cases in which the judgment, as stated, has been obtained by either fraud, deceit, surprise or irregularity, neither of which is alleged in the present case. The claim is that Lewis fraudulently obtained the privilege of serving upon the jury; but it is not and can not be claimed that the judgment was obtained through this means, or that it is in any sense a fraudulent judgment.

2.

In the second place, we submit that the objection that a juror was disqualified comes too late after verdict, especially in a civil case, and where the disqualification is, not *propter affectum* but *propter delictum*.

The position of the plaintiffs in error is that the juror Lewis was incompetent, and therefore a *non-juror*, or no

juror at all; and that, consequently, the plaintiffs in error have been deprived of their constitutional right to have the issues passed upon and determined by a jury of twelve men.

As pointed out in 1 Thompson on New Trials, Sec. 116, some of the American authorities have followed Shane *v.* Clark, 3 H. & J., 101, 103, holding the disqualified person to have been a non-juror, etc., and these are the authorities in support of their proposition which will be found in the brief of plaintiffs in error, namely, Shane *v.* Clark, 3 H. & J., 101; Herndon *v.* Bradshaw, 4 Bibb, 45; State *v.* Babcock, 1 Conn., 401; Briggs *v.* Georgia, 15 Vt., 61; Garratt *v.* Weinberg, 54 So. Car., 127. In others of the cases cited on behalf of the plaintiffs in error, the objection is sustained in favor of life and liberty, the cases being indictments for crime, and the courts declaring that a different rule prevails in civil cases. U. S. *v.* Angney, 6 Mackey, 66; State *v.* Babcock, *supra.*

Still other cases draw a distinction between disqualification *propter affectum*, involving bias, interest and prejudice, and disqualification *propter delictum*, holding the former available after verdict, but the latter not so. Thus, in Sellers *v.* People, 4 Ill., 412, a juror had declared that the prisoner would and ought to be hanged, and that nothing could save him, but had, nevertheless, visited the prisoner in jail and declared that he ought not to be hanged, and would not be if he should be on the jury, apparently with no other object than that of being enabled to serve on the jury and aid in a conviction. When the panel was being selected, the juror in question swore that he had neither formed nor expressed any opinion. A new trial was granted, not on the ground that the juror swore falsely when being examined, but on the ground that he had pre-judged the case and was not an impartial juror. So, in Essex *v.* McPherson, 64 Ill., 349, the new trial was

granted on an unsuccessful plaintiff's motion, on the ground that one of the jurors had had an outstanding wager that the defendant would win the case, thus being interested in the verdict against the plaintiff. So, in Moore *v.* Mutual Insurance Company, 107 Ga., 199, the new trial was granted because six of the jurors were near relatives of parties pecuniarily benefitted by their verdict; and in State *v.* Brockhaus, 72 Conn., 109, the court, in terms, distinguishes between disqualifications *propter affectum*, affecting impartial and honest action, and disqualifications *propter delictum*, not substantially affecting the impartiality of the jurors, and declaring the law settled that, as to the latter, "a strictly technical qualification of a juror fixed by statute is a qualification the want of which is healed by verdict."

But, as pointed out in 1 Thompson on New Trials, Sec. 116, the mass of American authority, grounded upon convenience and public policy, opposes the view set up in Shane *v.* Clark, and supports the doctrine that such disqualification, even when *propter affectum*, is not, *per se*, a ground of new trial, though it *may be* such in the discretion of the court.

It is further to be noted that, except in Vermont and South Carolina, the authorities relied upon in support of the objection are early cases, which have been either expressly overruled by later decisions in the same States, or are inconsistent with the later decisions in those States. Thus, Shane *v.* Clark is practically overruled by Johns *v.* Hodges, 60 Md., 215, and by Young *v.* State, 90 Md., 517; Herndon *v.* Bradshaw, 4 Bibb, 45, is overruled in effect by Presbury *v.* Commonwealth, 9 Dana, 203, 204, and State *v.* Babcock, 1 Conn., 401, by Sellech *v.* Turnpike Co., 13 Conn., 453, and by State *v.* Brockhaus, 72 Conn., 109. As to Briggs *v.* Georgia, 15 Vt., the Supreme Judicial Court of Massachusetts, speaking through the late Mr. Justice Gray,

declared, in Wassum *v.* Feeney, 121 Mass., 93, that the dissenting opinion correctly stated the law, and State *v.* Brockhaus, 72 Conn., 109, is to the same effect.

Wassum *v.* Feeney is cited and approved by this court in Kohl *v.* Lehlback, 160 U. S., 203, 301-2, holding the great weight of authority to be to the effect that disqualifications *propter delictum*, although not known until after the verdict, are not fundamental as affecting the substantial rights of a party, even in criminal cases, and that the verdict is not void for want of power to render it.

To like effect may be cited King *v.* Sutton, 8 B. & C., 417; Hill *v.* Yates, 12 East, 229; State *v.* Davis, 80 N. C., 412; Wilder *v.* State, 25 Ohio, 355; Greenup *v.* Stoker, 3 Gilman, 202; Chase *v.* People, 40 Ill., 352; McClure *v.* State, 1 Yerg., 206; Brewer *v.* Jacobs, 22 Fed. Rep., 235; U. S. *v.* Folsom, 36 Pac. Rep., 70, and Amherst *v.* Hadley, 1 Pick., 38; Chase *v.* People, 40 Ill., 355.

3.

In the last place, it is submitted that, (*a*) in any event, the application for the new trial, even had it been made in time, was an application addressed to the discretion of the court, admitting of no appeal, and, further, (*b*) that that discretion was rightly exercised.

(a.)

In Presbury *v.* Commonwealth, 9 Dana, 203, 204, cited in opposing brief, the case was one of alienage of a juror, not discovered until after the trial. The court said:

> "The granting of a new trial, after a verdict of twelve men, is a question addressed to the sound discretion of the court, and should not generally be granted if the justice of the cause has been attained, or rather, if there be no reasonable ground to believe that justice has not been done."

In Kohl *v.* Lehlback, 160 U. S., 301–2, above cited, this court, holding the disqualification of a juror *propter delictum* not to be fundamental, or to render the verdict void, adds: "Whether, where the defendant is without fault *and may have been prejudiced*, the new trial may not be granted on such a ground is another question."

In King *v.* Tremearne, 5 B. & C., 254, one had served as a juror who was not on the panel. *Held* that, if he had been on the panel, perhaps objection should have been made before verdict, but that, under the particular circumstances of the case, and even then upon the ground of a sound discretion, the rule for a new trial should be an absolute one.

In Johns *v.* Hodges, 60 Md., 215, two of the jurors were under age; *Held*, that the motion for new trial for this defect was an appeal to the court, resting wholly in its sound discretion, and its exercise of which was not the subject of appeal; and that, as a rule, such an objection after verdict comes too late, notwithstanding the fact that the disqualification may not have been discovered earlier.

In Young *et al. v.* State, 90 Md., 579, the trial was for murder, and the jurors upon their *voir dire* had stated that they had not formed or expressed any opinion as to the guilt or innocence of the prisoners. While the trial was in progress, it was learned that one of the jurors, as foreman of the coroner's jury, had concurred in and presented its verdict that the deceased came to his death from the effect of a pistol shot wound, and that the prisoners were implicated in the shooting, whereupon the objection was forthwith made, before the State's evidence was in. *Held*, that the objection, being made after the jury was sworn, came too late. "If his presence on the jury resulted detrimentally to justice, the Court, after the verdict, was fully empowered to grant a new trial."

So, 1 Thompson on New Trials, Sec. 116, states: "In England, and in many American jurisdictions, a paramount

inquiry upon such an objection is, whether it has resulted in an *unjust verdict*; if not, the objecting party has sustained no injury, and the new trial will not be granted in order that public and private time may be consumed, and the danger of other irregularities incurred, when the same result must, on a just view of the evidence, be reached. Unless there is plain evidence of injustice done to the party complaining, the verdict should be allowed to stand," citing numerous authorities.

A new trial will not be granted because of disqualification of a juror, not discovered until after trial, unless it be made to appear that there was no want of due diligence on the part of the party complaining of the verdict, and it must also be made to appear that injury resulted to him by reason thereof. Triplett *v.* State, 1 Tex. App., 651; Roseborough *v.* State, 43 Tex., 574.

(b.)

If, however, this discretionary power of the court were reviewable, it is respectfully submitted that, in the present case, it was rightly exercised.

In the first place, it cannot escape observation that no offer to show that the discretion was abused, or that any injury or injustice has been suffered by the appellants, is attempted by or on behalf of the plaintiffs in error.

In the second place, the record shows that a verdict for the will was directed by the court, without objection, upon the issues touching fraud, undue influence and circumvention. The only remaining question was that of mental incompetency; and any question as to the proper exercise of its discretion by the trial court, therefore, presents only the inquiry whether the fact that one of the jurors lacked a few months of being 21 years of age, and had been convicted of larceny when he was 15 years old, should require a new trial of the question of the testator's sanity, when,

as is stated in the order appealed from (Record pp. 14–15), there was no evidence in the case upon which a verdict against the mental capacity of the testator could have been sustained, if rendered.

An examination of the testimony set forth in the record will abundantly sustain this view of the trial justice, even independently of the fact that the court below had the better opportunity of seeing the witnesses, observing their manner of testifying, and weighing their testimony.

Of the witnesses produced on behalf of the caveators, Mrs. Heineke (p. 16) testified that she had never heard the testator's mental capacity questioned in his lifetime, although everybody she knew, knew him, and that she had never heard his mental capacity questioned since his death by anyone except by the caveators. Dr. George B. Heineke (p. 18) testified that urethral calculus, the only disease he knew the testator to have suffered from until after the execution of both the will and codicil, could not be connected with the condition of his brain, as shown by the autopsy, and gave no opinion adverse to his mental capacity. Dr. Howard H. Barker (p. 27), his family physician, testified simply to the urethral calculus, that it was no indication of mental unsoundness, that he knew the testator from about the first of April, 1892, to the first of April, 1898, during which time he never saw anything wrong with him, either mentally or physically, with the exception of the physical ailment referred to. Dr. Norman R. Jenner (p. 17) who attended him professionally shortly before his death, testified that he saw nothing to indicate that his mind was not all right, that he answered intelligently all questions the witness propounded to him, and that the witness saw no indication that his mind was unsound, while Dr. George N. Perry (p. 28), the attending physician during the latter part of testator's life, testified

that he had frequent conversations with him, and that he had but one opinion, namely, that he was perfectly sound and rational up to a short time before his death. These were the only witnesses produced by the caveators who ever knew or saw the testator in his lifetime, with the exception of Mr. Edmonston (p. 30), whose examination by them was confined to testimony concerning the extent of the assets of the estate.

An autopsy was performed upon the testator's brain, for the purpose, as shown by the testimony of his attending physician and relative, Dr. George N. Perry, called as a witness on behalf of the caveators, of ascertaining the cause of certain convulsions which preceded his death. Record p. 28. The autopsy was performed by Dr. D. S. Lamb, in the presence of a number of other physicians, Dr. Lamb testifying that, from the conditions found, he could not undertake to say that the testator was of unsound mind or incapable of transacting business.

The only other witnesses called by the caveators were Drs. R. S. Lamb and Irving C. Rosse, testifying simply as experts as to the conditions disclosed by the autopsy. These conditions (Record, p. 19), were as follows:

> "Artery of brain extremely atheromatous, stiffened, brittle, standing wide open cut, brain general atrophied and pale; increase of subarachnoidal fluids, lateral ventricles dilated; some small cysts in left internal capsule and optic thalamus; a few small cysts in centrum ovale majus; cause of death, anæmia of brain."
>
> "Brain not kept."

Dr. R. S. Lamb testified that, in his opinion, the brain was "rather unhealthy," and that the disease producing the above conditions had been progressing from eight to ten years prior to death, but stating no opinion as to its effect upon the testator's mental capacity.

Dr. D. S. Lamb (Record, p. 26) testified that the atrophy was "general" in the sense that the shrinking was about general, there being no particular place in which it appeared more evident than in others; that this atrophy is usual in old age, and applies to nearly all the organs of the body; that it was not possible to tell from the examinations in this case, where the condition was a general wasting, whether the mind was sound or unsound; that, as to the small cysts of the optic thalami, entire paralysis of one of those organs of the brain would have had no practical effect on the intellectual faculties; that he found nothing in the condition of the brain not due to ordinary changes of advancing age; that it was not a case of premature old age, and that the increase of subarachnoidal fluids, referred to in the result of the autopsy, was simply an increase resulting from the atrophy of the brain.

It will be seen that, up to this point, there was absolutely no scintilla of evidence of any mental unsoundness, and that, on the contrary, there was the strongest evidence, both of physicians and of others, that the testator's mind was perfectly sound; that, among all the persons who knew him, no suggestion of incapacity was made while he lived, and none by anybody after his death except by the appellants, who had been ready to contest the wills of Francis Hauptman and of Mary E. Hauptman as well, if they could profit pecuniarily by so doing—and yet no one of whom could be found willing to take the stand as a witness in the case, to attack or question the testator's capacity.

The testimony of Dr. Irving C. Rosse will be found at pages 31 to 33 of the record, and, it is submitted, although he does state that the report of the post mortem examination, in his opinion, indicated a progressive disease of the brain, and that he "should say" it indicated an unsound mind, his testimony as a whole does not strengthen the

caveators' situation. He nowhere says that the unsoundness which he "should say" existed, was sufficient to incapacitate the testator from transacting his business affairs or from making a valid will, deed or contract; while the grounds, theories and conditions of knowledge from which he testifies, as disclosed by his cross-examination, render his testimony still more inconsequential.

He states, for example, that the atheromatous condition of the blood vessels, which is the first indication of mental unsoundness he finds in the report of the autopsy, does not always involve mental unsoundness; that the diminution of nutrition through atheromatous conditions of the arteries is not the only reason why it affects the mind, and that he does not know any other way in which atheromatous conditions could affect the mind except through diminution of the blood supply; that the next indication of mental unsoundness in the report of the autopsy was the general atrophy of the brain; that the mind is unsound whenever the brain is atrophied; that the brain is atrophied by age as well as the other organs of the body and that such atrophy results naturally from advancing years; that old age produces marked atrophy of the brain, and that he cannot fix any average age at which this begins, not because this is not fixed in medical science, but because he, the witness, does not know; that he cannot tell within twenty years of the time at which atrophy of the brain without disease is naturally to be expected; that the third reason for supposing there was mental unsoundness rests upon the fact of the small cysts on the left internal capsule and left optic thalamus; that he does not know the functions of either of these parts of the brain, or whether there is any doubt in the medical profession as to what their functions are; that he does not know the location in the brain of the optic thalami, and that, in view of the fact, admitted by him, that one

whole hemisphere of the brain might be paralyzed, the internal capsule and optic thalamus included, without impairing the mind, the existence of a few cysts on one side would not indicate mental unsoundness; and he is finally driven to rest his conclusion upon the fact, claimed by him, that "most bodily ailments will affect the mind, and that a bad cold or a toothache, taken in connection with other things, would tend to confirm witness' impression of the testator's mental unsoundness." He further testifies that the division of the brain into a right and a left hemisphere is merely an arbitrary division, which does not exist in nature; that one hemisphere of the brain might be entirely removed and the mind be wholly preserved; that he knows of an instance where one hemisphere was diseased and replaced by pus, the man's mind remaining sound: and that one side of the brain is sufficient for the performance of the mental faculties.

On the other hand, Drs. Edmund L. Tompkins and A. B. Richardson, specialists in brain and nerve diseases, the latter Superintendent of the Government Hospital for the Insane, testify, what all know, that the division of the brain into a right and a left hemisphere is no more arbitary than the division of the lower part of the body into a right and a left leg; that the location of the optic thalami in the brain is no more obscure or doubtful than the location of the foot on the leg; that the existence of cysts in one optic thalamus or internal capsule would not affect the thinking powers of the brain, and that neither of those organs has anything to do with the intellectual faculties or thinking parts of the brain; they concur with Dr. Lamb that the condition of the testator's brain, as disclosed by the report of the autopsy, indicates nothing whatever with regard to the testator's mental soundness; they state that there is no connection between toothache and mental unsoundness,

or between a cold and mental unsoundness, and that there is nothing which could be taken in connection with toothache or a cold in determining the soundness of a man's mind, etc.

This brief will not be protracted by summarizing the testimony of the fourteen witnesses, in addition to those who attested the will, offered by the caveatees, and who testify to the complete intelligence, capacity and mental soundness of the testator. It is entirely apparent that there was no "scintilla of evidence," no conflict of testimony "about which reasonable men could differ," and nothing which could by any possibility have led to a different result, no matter how the jury was constituted, or which could lead to a different verdict before any future jury which could be empanelled.

The court must have directed a verdict upon all the issues if requested, and, as is disclosed in its order overruling the motion to vacate the decree, would readily have done so. To argue that, under these conditions, the denial of the motion was either an abuse or an erroneous exercise of the judicial discretion, is superfluous.

It is respectfully submitted that the decree and order appealed from should be affirmed.

JOSEPH A. BURKHART,
J. J. DARLINGTON,
Attorneys for Defendants-in-Error.

Supreme Court of the United States.

No. 64.—October Term, 1902

Helen C. Raub, Charles D. Collins, Lewis E. Collins, et al., Plaintiffs in Error,
vs.
Helen C. Carpenter, Helen K. Bremerman, Edmund H. Brown, et al.

In error to the Court of Appeals of the District of Columbia.

[December 1, 1902.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

This is a writ of error to a judgment of the Court of Appeals of the District of Columbia, affirming certain orders of the Supreme Court of the District, holding a special term for orphans' court business, admitting a will and codicil to probate and granting letters testamentary thereon; and denying a motion to vacate that decree.

Plaintiffs in error filed a caveat to the probate and record of the writings purporting to be the will and codicil, and issues, addressed to both, as to mental capacity, fraud or coercion, and undue influence, were framed for trial by jury.

Trial was had, and on the conclusion of the evidence the court, at the request of the caveatees, instructed the jury that there was no evidence tending to show fraud, undue influence or coercion, and that on these issues the jury should render its verdict for the caveatees. To which the caveators made no objection, and preserved no exception. Three instructions in respect of the mental capacity of the deceased to make a valid will or codicil were given on behalf of the caveators as requested by them.

The jury returned a verdict June 15, 1900, in favor of the caveatees. No motion for a new trial was made within four days as required by rule 53 of the court, or prior to June 26, when the court entered an order and decree admitting the will and codicil to probate, and granting letters testamentary thereon, from which an appeal was taken to the Court of Appeals.

Several exceptions were reserved to the rulings of the court in the progress of the trial, which were disposed of by the Court of Appeals satisfactorily as we think. But one of them has been pressed on our attention.

Dr. George B. Heinecke, a practicing physician in Washington, and a grandnephew of deceased, testified that he had known deceased ever since

he could recollect, and was accustomed to seeing him frequently; that he had seen him when recovering from attacks of epilepsy subsequently to the execution of the will and codicil; "that testator had stated to him that he was a sufferer from urethal calculus; that on the 13th of March, 1896, he had seen the testator have a fainting spell;" "that he had on one occasion seen testator laughing to himself; that on or about the 13th of February, 1899, during the blizzard, the testator acted peculiarly about the snow in his yard; did not know how it got in there, all of it, and went out there and tried to get it removed;" and witness stated the result of the autopsy and the cause of death. He was then asked the following question: "Doctor, have you formed any opinion, from your uncle's general condition of health and the conditions disclosed by his brain at this investigation, *and from all you know about him yourself*, what his condition of mind was?"

To that portion of the question which called for an opinion from the witness from "all that you know about him yourself," the caveatees objected on the ground that no sufficient basis had been laid for that portion of the question, and that the facts relied upon in this particular should be first adduced. The court sustained the objection and caveators preserved an exception.

We agree with the Court of Appeals that the trial court did not err in holding that portion of the question objectionable, and, if so, the question as framed could not properly have been allowed to be propounded, though caveators were left free to put it with the objectionable words omitted. Clearly the opinion of the witness from facts he did not disclose was inadmissible. If he knew anything about the deceased other than what he had stated, which aided him in arriving at a conclusion, that knowledge should have been developed. In that particular the question assumed the existence of facts for which there was no foundation in the evidence.

So far as the conduct of the trial was concerned we find no reversible error.

On July 16, 1900, twenty days after the decree was entered, caveators moved that that decree be vacated on the ground that one of the jurors was disqualified for service on the jury by the fact that he was under the age of twenty-one years, and by the fact that he had several times been convicted of the crime of petty larceny in the police court of the District. The motion was supported by transcripts from the records of the police court, and by affidavits, sustaining both disqualifications, the affidavits also showing that at the beginning of the trial term of the court at which they had been summoned, the jurors had all been examined on their *voir dire* by the presiding justice as to their qualifications to serve on the jury; that the juror now charged to be disqualified had then and there falsely answered that he was over the age of twenty-one years, and had never been

convicted of crime; that one of the counsel for the caveators was present in court at the time of such examination; and that the falsehood of the statements of the juror in question was not known to the caveators or their counsel until after the entry of the order now sought to be vacated. The motion to vacate was denied, the record stating "the court further being of opinion that at the trial there was no evidence of mental incompetency, fraud, or undue influence."

From this order the caveators took their second appeal.

Viewed as an ordinary motion for a new trial, the motion was not seasonably made under the rules, nor is it contended that the judgment came within the Maryland act of 1787, ch. 9, sec. 6, 2 Kilty; *Spalding* v. *Crawford*, 3 App. D. C. 361, as having been obtained by fraud, deceit, surprise or irregularity in the sense of that statute. But it rests on the power of the court to set aside a judgment at the term at which it is rendered under circumstances calling for the exercise of its discretion in that regard, or on the assumption that the trial and verdict were absolutely void because of the incompetency of the juror.

By section 872 of the Revised Statutes relating to the District of Columbia, as amended by the act of March 1, 1889, 25 Stat. 749, it is provided: "No person shall be competent to act as a juror unless he be a citizen of the United States, a resident of the District of Columbia, over twenty-one and under sixty-five years of age, and a good and lawful man, who has never been convicted of a felony or misdemeanor involving moral turpitude."

Treating the application as open to consideration by reason of the discovery of the existence of the alleged objection after verdict and judgment, but as amounting to no more than a motion for new trial made in apt time, it was within the discretion of the trial court to grant or deny it, and the Court of Appeals held that the order denying it was not appealable. But the court also held that the discretion of the trial court was properly exercised; that there was not only no evidence in support of the charges of "fraud, undue influence, circumvention, or coercion," which was conceded, but that "the charge of mental unsoundness is wholly unsustained and without any support whatever in the testimony;" and that the trial court would have been fully justified in peremptorily directing a verdict on this issue as well as on the others, as that court in the order appealed from intimated it would have done if requested. In short, the two courts agreed that the facts were with the caveatees, and, unless clearly erroneous, which does not appear, we should accept their finding. *Towson* v. *Moore*, 173 U. S. 17, 25.

And as the verdict was the only verdict that could be rendered consistently with the facts, the presence of this juror in the box could not have operated to the prejudice of plaintiffs in error.

In *Wassum* v. *Feeney*, 121 Mass. 93, the rule that "when a party has had an opportunity of challenge, no disqualification of a juror entitles him to a new trial after verdict," was applied, and it was held that "a verdict will not be set aside because one of the jurors was an infant, where his name was on the list of jurors returned and empanneled, though the losing party did not know of the infancy until after the verdict." And Mr. Justice Gray, then Chief Justice of Massachsetts, delivering the opinion, cited, among other cases, *Hill* v. *Yates*, 12 East, 229, where the son of a juryman unlawfully served in his father's place, and pointed out that Lord Ellenborough there "said that he had mentioned the case to all the judges, and they were all of opinion that it was a matter within their discretion to grant or refuse a new trial on such a ground; that if no injustice had been done, they would not interfere in this mode."

Wassum v. *Feeney* was cited with approval and quoted from in *Kohl* v. *Lehlback*, 160 U. S. 293, 301, as in accordance with the great weight of authority. This case involved the disqualification of alienage, but did not require the determination of the question, "whether, where the defendant is without fault and may have been prejudiced, a new trial may not be granted on such a ground," though it was referred to.

Garrett v. *Weinberg*, 54 S. C. 127, is relied on by plaintiffs in error as ruling in a civil case that a new trial should be granted when a disqualified juror sat, the parties or their attorneys not knowing of the disqualification until after verdict. But that was a case of a motion for new trial made in the ordinary way, and the juror was held disqualified under the express provisions of the constitution of the State, which in that respect were held to be mandatory, so that the jury was not a "constitutional jury," but the court did not intimate that the incompetency rendered the verdict and judgment void, and, on the contrary, treated ignorance of the fact until after trial as material.

In *Kohl* v. *Lehlback*, we held that "the disqualification of alienage is cause of challenge *propter defectum*, on account of personal objection, and if voluntarily, or through negligence, or want of knowledge, such objection fails to be insisted on, the conclusion that the judgment is thereby invalidated is wholly inadmissible. The defect is not fundamental as affecting the substantial rights of the accused, and the verdict is not void for want of power to render it." *Hollingsworth* v. *Duane*, Wall. C. C. 147, was referred to, where the court placed alienage, infancy, infamy, and affinity, in the same category. See *Goad* v. *State*, 106 Tenn. 175; *State* v. *Powers*, 10 Oregon, 145; where disqualification *propter delictum* was held not to be in itself fatal after verdict.

No reason is perceived why this particular objection could not be waived by the parties, and even where a party by reason of excusable want

of knowledge might be entitled to claim that he had not waived it, that would go to the merits on application for new trial, and not to the want of power. The verdict and judgment not being absolutely void, it is unnecessary to pursue the subject further, as there is nothing to show that injustice was done to caveators, and the trial court did not abuse its discretion in the premises.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.